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JUSTICE SCALIA: STANDING, ENVIRONMENTAL LAW, AND THE SUPREME COURT

*Michael A. Perino**

I. INTRODUCTION

President Reagan's appointment of Antonin Scalia to the United States Supreme Court raises concern among liberals that Justice Scalia will help lead the Court away from a number of liberal positions toward a new conservatism.¹ The Reagan Administration's requirement that judicial appointments advance the Administration's preference for judicial restraint and strict constructionism enhances this concern.² These new executive requirements mean that federal courts should accord greater authority to the democratically elected branches of the government.³ Justice Scalia's primary areas of study, administrative law and separation of powers, reflect his adherence to judicial self-restraint.⁴

One aspect of administrative law and separation of powers that could have a great negative influence on environmental litigation is the doctrine of standing, especially as standing relates to obtaining judicial review of administrative decisions. Scalia has advocated a position on standing that could severely limit the ability of litigants to obtain judicial review where they allege an environmental injury.

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¹ See Chapple & Kraus, *Rehnquist-Scalia Combined Effect May Far Exceed Current Predictions*, Nat'l L.J., Sept. 15, 1986, at 24, col. 1.

² See *Chief Justice Burger to Retire From Supreme Court; Reagan Nominates Rehnquist as Successor, Scalia to Fill Vacancy*, 17 Env't Rep. (BNA) at 217 (June 6, 1986). See also Boyd, *Bork Picked for High Court; Reagan Cites his 'Restraint'; Confirmation Fight Looms*, N.Y. Times, July 2, 1987, at 1, col. 6.

³ See R. POSNER, *THE FEDERAL COURTS* 208 (1985).

⁴ See *Two Nominees, One Philosophy*, Nat'l L.J., June 6, 1986, at 15, col. 1.

This Comment focuses on the possibility that Scalia will be able to erect a stricter standing doctrine inimical to environmental interests. Section II examines the doctrine of standing and the favored position that courts have granted environmental litigants. In Section III, this Comment discusses how Scalia, at least theoretically, is opposed to such a favored position for environmental litigants. Section IV analyzes Scalia's position on standing as manifested in his opinions on the District of Columbia Court of Appeals. Finally, this Comment concludes by discussing how these factors, combined with Scalia's philosophy of judicial self-restraint, illuminate the possible position Scalia will take in environmental cases that come before the Supreme Court.

The overall purpose of this Comment is to examine both Scalia's theoretical writings and his judicial opinions to explore how the practicalities of judicial decisionmaking have modified Scalia's scholarly positions. In this manner, the Comment explores the tensions inherent between the twin roles of scholar and jurist. In conjunction with this analysis, this Comment also examines how Scalia is still able to advance his theoretical and philosophical beliefs concerning judicial self-restraint. In this way, this Comment highlights what factors go into Scalia's decisionmaking. This Comment thus provides a framework for analyzing how Scalia will approach particular cases that come before the Supreme Court.

II. THE DOCTRINE OF STANDING

Standing concerns whether a plaintiff has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.⁵ Standing focuses primarily on the party seeking access to the courts and only secondarily on the issues that party seeks to adjudicate.⁶ The doctrine of standing derives from article III of the Constitution, which restricts courts to hearing only cases or controversies.⁷ Typically, the question becomes whether the dispute sought to be litigated "will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."⁸ Courts reason that, unless these requirements are met, the issues will not

⁵ *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972).

⁶ *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

⁷ U.S. CONST. art. III, § 2. See G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 207 (3d ed. 1986) [hereinafter ROBINSON].

⁸ *Flast*, 392 U.S. at 101.

be presented with the necessary adverseness that illuminates and sharpens difficult constitutional issues.⁹

Although seemingly simple on its face, the doctrine of standing has been described as “among the most amorphous in the entire domain of public law.”¹⁰ Standing has been subject to widespread scholarly criticism.¹¹ This criticism focuses on the erratic manner in which the Supreme Court has applied the doctrine.¹² A number of commentators argue that the primary reason for the Court’s inconsistent application of the standing doctrine is its willingness to let its view of the merits dictate the result it reaches on the standing issue.¹³ In other words, the Supreme Court uses standing to achieve a number of jurisprudential and functional goals that go beyond the threshold question of the plaintiff’s ability to have particular issues heard.¹⁴ In this manner, the Court has used standing: (1) to avoid deciding issues it does not want to decide; (2) to allow the Court to decide issues it wants to decide; (3) to avoid deciding issues that it believes other branches of government should decide; (4) to reflect the subjective values the Court assigns to various constitutional and statutory rights; and (5) to avoid deciding cases where the plaintiff’s claim has little merit.¹⁵ Such decisionmaking falls under the rubric

⁹ *Baker v. Carr*, 369 U.S. 186, 204 (1962).

¹⁰ J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 69 (1986) (quoting *Hearings on S.2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 2, 498 (1966)).

¹¹ Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185 (1980–81); Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984); Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RESOURCES J. 76 (1973); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1723–47 (1975).

¹² E.g., Nichol, *Abusing Standing: A Comment on Allen v. Wright*, *supra* note 11, at 635.

¹³ L. TRIBE, *CONSTITUTIONAL CHOICES* 100 (1985).

¹⁴ See Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973). See also Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 302 (1979) (arguing that there are three interrelated policies behind the case or controversy requirement: “the smooth allocation of power among courts over time; the unfairness of holding later litigants to an adverse judgment in which they may not have been properly represented; and the importance of placing control over political processes in the hands of the people most closely involved”).

¹⁵ R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 143 (1985) [hereinafter PIERCE]. See also L. TRIBE, *CONSTITUTIONAL CHOICES* 99–120 (1985); J. VINING, *LEGAL IDENTITY* 10 (1978) (referring to this use of standing as “Machiavellian”).

of what can be termed "value-laden decisionmaking." Value-laden decisionmaking arises where judges allow their philosophic predilections to influence the results of their standing decisions. The result of this value-laden decisionmaking is a disjointed standing doctrine that erects unprincipled exceptions in certain types of cases and yet provides little barrier to litigation in others.¹⁶

The current standing doctrine is thus filled with permutations and inconsistencies that make any attempt at defining a general rule difficult.¹⁷ Despite this difficulty, it is possible to outline the framework the Supreme Court uses to analyze standing issues in cases seeking judicial review of agency action generally, and specifically environmental cases.

A. Standing to Obtain Judicial Review of Administrative Actions

Courts analyze standing to challenge agency actions under the two-part approach adopted by the Supreme Court in *Association of Data Processing Service Organizations v. Camp*.¹⁸ *Data Processing* established the modern approach to standing issues.¹⁹ In addition, *Data Processing* provided the analytical framework for two major shifts in the modern standing doctrine: a continued trend toward an increased liberality of application,²⁰ and a concentration on the plaintiff's claimed injury.²¹

Data Processing concerned a suit by petitioners, who provided data processing services to businesses, challenging a ruling by the Comptroller of the Currency permitting banks to make data pro-

¹⁶ L. TRIBE, CONSTITUTIONAL CHOICES 100 (1985).

¹⁷ For a fuller discussion of standing to sue, see 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 24:1-24:36 (2d ed. 1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 79-114 (1978).

¹⁸ 397 U.S. 150 (1970).

¹⁹ L. TRIBE, AMERICAN CONSTITUTIONAL LAW 79-80 (1978).

²⁰ Scott, *Standing to Sue in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 646 (1973). *Data Processing* was a continuation of the increasingly liberal application of the standing doctrine begun by the Supreme Court two years earlier in *Flast v. Cohen*, 392 U.S. 83 (1968). Since *Data Processing*, however, the Burger Court has backed away from the extreme liberal approach of *Flast* and *Data Processing*. See *Allen v. Wright*, 468 U.S. 737 (1984); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Despite this retrenchment, it is still accurate to refer to the liberalized standing doctrine since standing is still more liberally applied than in the pre-*Flast* era. Moreover, standing in environmental cases has not been subject to the same retrenchment as cases in other areas. See *infra* text accompanying notes 69-104.

²¹ See *PIERCE*, *supra* note 15, at 142.

cessing services available to other banks and bank customers.²² In holding that the petitioners had standing, the Supreme Court stated that “[t]he first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise,”²³ and the second question is “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”²⁴

The *Data Processing* Court indicated that the first part of the test, injury in fact, arises from the “case or controversy” requirement of article III of the Constitution.²⁵ Given this basis in article III, the Court viewed injury in fact as a limitation that keeps the judiciary from becoming involved in the process of making and implementing laws.²⁶ By ensuring that the judiciary can only decide actual disputes, courts will thus be kept out of debates concerning the best policy the government should follow on a particular problem.²⁷ Accordingly, judges often state that standing limitations are necessary to prevent a government by the judiciary.²⁸

In *Data Processing*, the Court found that the injury sufficient to confer standing was the possibility that competition from national banks in the business of providing data processing services might entail some future loss of profits for the petitioners.²⁹ Because two different parties caused those injuries, the data processors had standing to sue both. First, the data processing company had standing to sue the bank because the data processing association alleged that the bank was preparing to take some of their customers.³⁰ Second, the Court found that the Comptroller had also caused petitioners’ injury because the Comptroller’s ruling precipitated the above injury.³¹

Implicitly, the Court found injury where the harm had not yet occurred.³² While the Comptroller had given banks permission to

²² *Data Processing*, 397 U.S. at 151. The District Court dismissed the complaint for lack of standing and the Court of Appeals affirmed. *Id.*

²³ *Id.* at 152.

²⁴ *Id.* at 153.

²⁵ *Id.* at 151–52 (analyzing U.S. CONST. art. III, § 2).

²⁶ See *PIERCE*, *supra* note 15, at 141.

²⁷ *Id.* at 141–42.

²⁸ See, e.g., *United States v. Richardson*, 418 U.S. 166, 188–92 (1974) (Powell, J., concurring).

²⁹ *Data Processing*, 397 U.S. at 152.

³⁰ *Id.*

³¹ *Id.*

³² See *id.*

compete with the data processors, the data processors had not yet lost any profits or customers.³³ Thus, the data processors sustained a sufficient injury in fact without any actual deleterious effects on their business.³⁴ In a sense, this decision transformed a court's standing analysis from a decision about legally sufficient injuries suffered into a decision concerning the likelihood that an injury will indeed occur. The acceptance of such contemplated injuries is consistent with the trend toward judicial acceptance of more tenuous injuries as sufficient to invoke standing.³⁵ *Data Processing* thus helped move the Court toward a more liberal application of the standing requirements.³⁶

In later decisions, the Court specified the requirements for injury in fact.³⁷ This specification is symptomatic of the increasing focus on the injury in fact portion of the *Data Processing* test. The Court's later decisions required: (1) that the litigants show that they have suffered personally some actual or threatened injury;³⁸ (2) that the injury must be fairly traceable to the alleged illegal conduct of the defendant;³⁹ and (3) that the injury must likely be redressed by a favorable decision.⁴⁰ The Court has thus specifically delineated what is required for injury in fact while leaving zone of interest an amor-

³³ See *id.*

³⁴ See *id.*

³⁵ Compare *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-79 (1938) (personal or economic interest is insufficient; standing requires a plaintiff to show that a legal right has been invaded) with *Federal Communications Comm'n v. Sander Bros. Radio Station*, 309 U.S. 470, 476-77 (1940) (statutory language granting judicial review to "persons aggrieved" by a FCC license decision included competitors facing potential economic injury from the agency's action).

³⁶ See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) (environmental groups and individuals who lived near sites of proposed nuclear power plants had standing to challenge Price-Anderson Act's limitation of liability in case of a nuclear accident to \$560 million as an unconstitutional taking); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) (group of law students had standing to challenge Interstate Commerce Commission's approval of railroad surcharge for transporting scrap materials because it damaged the air they breathed).

³⁷ See *infra* notes 38-41.

³⁸ *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (individual respondents had standing as testers to prove that petitioner's discriminatory steering practices documented by their testing deprived them, as residents of the adversely affected area, of the social and professional benefits of living in an integrated society).

³⁹ See *Warth v. Seldin*, 422 U.S. 490, 504 (1975) (petitioners did not have standing because they were unable to show that their inability to purchase housing was due to town's restrictive zoning practices).

⁴⁰ *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (indigent petitioners did not have standing because they were unable to show that removal of favorable tax treatment for hospitals which refused to serve the indigent would result in the availability of such services from those hospitals).

phous and unrefined concept. The Supreme Court has referred to the injury in fact standards as the "irreducible minimum" required by the Constitution.⁴¹

In addition to this "irreducible minimum" the Court applies a set of discretionary factors—designated "prudential limitations." These limitations stem from separation of powers notions about when courts should or should not intervene in agency actions.⁴² These limitations act as a self-checking device designed to keep the judiciary from usurping functions properly left to other branches of government. One such prudential limitation is that the Court will not decide cases in which the harm is merely a "generalized grievance" shared in substantially equal measure by all or by a large class of citizens.⁴³ For example, in *Schlesinger v. Reservists Committee to Stop the War*, the respondents, an association of present and former members of the Armed Forces Reserve opposing United States involvement in Vietnam, brought a class action on behalf of all citizens of the United States.⁴⁴ They were challenging the Reserve membership of Congressmen as violating the Incompatibility Clause of the Constitution.⁴⁵ In *Schlesinger*, the Supreme Court held that respondents had no standing to sue as citizens since the claimed nonobservance of this clause implicates only a generalized interest of all citizens in constitutional governance and is thus merely an abstract injury.⁴⁶ Therefore, because the association did not show actual harm, there was no standing.

The Supreme Court in *Schlesinger* reasoned that the generalized grievance limitation was necessary to keep the courts from deciding abstract questions of wide public significance where other governmental institutions were more competent to address the questions and where judicial intervention was unnecessary to protect individual rights.⁴⁷ The Court imposed these limits to keep the judiciary within their predetermined constitutional role.⁴⁸ The problem with

⁴¹ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

⁴² See ROBINSON, *supra* note 7, at 210.

⁴³ *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216–27 (1974).

⁴⁴ *Id.* at 210–11 & n.1.

⁴⁵ *Id.* at 210–11 (The Incompatibility Clause, U.S. CONST. art. I, § 6, cl. 2, states that "no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office.").

⁴⁶ *Schlesinger*, 418 U.S. at 217. The respondents asserted that the nonobservance of the clause deprived citizens of the faithful discharge of the legislative duties of reservist members of Congress. *Id.*

⁴⁷ *Warth v. Seldin*, 422 U.S. at 499–500.

⁴⁸ See ROBINSON, *supra* note 7, at 207.

these "prudential limitations," however, is that they require judges to examine closely the underlying claims, or merits, of a case. Such an in-depth look necessarily focuses the judge's attention on his view of the claim's validity rather than merely the plaintiff's ability to assert the claim. This is a further reason why the courts have reached such widely inconsistent, value-laden results in standing cases.⁴⁹

The second part of the *Data Processing* test, the "zone of interest" test, is statutory.⁵⁰ This part refers to whether Congress intended to allow parties in plaintiff's situation to obtain judicial review.⁵¹ This second step has lost much of its vitality in recent years. Scholars generally consider the only important question in standing is whether an alleged injury is sufficient to invoke the court's jurisdiction.⁵²

This scholarly view of the zone of interests test is based on the broad reading usually given to congressional intent. Courts read the "zone of interest" test as recognizing that it is within congressional discretion, as a matter of policy, to decide who may obtain review of agency actions.⁵³ In interpreting a statute under which an agency operates, courts tend to enlarge the class of people who may protest an administrative action.⁵⁴ This expansive interpretation removes a court's self-imposed "prudential limitations" and limits judicial inquiry to the question of injury in fact.⁵⁵ The test thus acknowledges that Congress can expand the scope of standing up to the constitutional limits.⁵⁶ If most congressional grants expand standing up to

⁴⁹ Compare *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 687-88 (1973) (group had standing to sue because of injury to the air they breathed) with *Linda R.S. v. Richard D.*, 410 U.S. 614, 616-19 (1973) (mother of illegitimate child denied standing to challenge child support statute that is enforced only in favor of legitimate children).

⁵⁰ *Id.* at 153.

⁵¹ See *id.*

⁵² See 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24:17 (1983); see also Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1669, 1723-47 (1975). This view is supported by the recently decided *Clarke v. Securities Industry Ass'n*, 107 S. Ct. 750 (1987), where the Supreme Court gave a very liberal reading to the "zone of interests" test. Scalia recused himself from the case, *id.* at 762, because he had participated in the case on the District of Columbia Court of Appeals and had dissented from that court's finding of standing. See *Securities Industry Ass'n v. Comptroller of the Currency*, 758 F.2d 739, 740 (D.C. Cir. 1985).

⁵³ *PIERCE*, *supra* note 15, at 142.

⁵⁴ *Data Processing*, 397 U.S. at 154.

⁵⁵ See *Warth*, 422 U.S. at 501.

⁵⁶ See C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.13 (1984). Examples of such congressional augmentation are numerous, especially in

the constitutional limits, then the only question that need be answered is whether a sufficient injury in fact exists.

The "zone of interests" test remains important, however, in the field of administrative law because it concerns the grant of judicial review contained in the Administrative Procedure Act (APA).⁵⁷ The APA was enacted to establish minimum procedural rules for agencies and to erect a framework for judicial review of agency decisions.⁵⁸ On the subject of judicial review, the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."⁵⁹ Although different commentators interpret this provision in a number of ways,⁶⁰ the general understanding, at the time of its passage, was that the provision codified the existing legal interest test⁶¹ and also referred to various statutory standing formulae ("adversely affected or aggrieved . . . within the meaning of a relevant statute").⁶²

The Court's decision in *Data Processing*, however, expanded that narrow reading⁶³ to include all interests potentially affected by agency actions taken pursuant to a statute.⁶⁴ The Supreme Court specifically rejected the Court of Appeals use of the "legal interest" test.⁶⁵ The Supreme Court found that the Comptroller's order allowing banks to provide data processing services, standing alone, was sufficient to render the petitioner/data processing company "aggrieved" and thus capable of challenging the order.⁶⁶ Therefore, the

the area of environmental interests. See, e.g., Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365 (1982); Clean Air Act, 42 U.S.C. § 7604 (1982).

⁵⁷ 5 U.S.C. § 702 (1982).

⁵⁸ See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.6 (1983).

⁵⁹ 5 U.S.C. § 702 (1982).

⁶⁰ Compare 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24:3 (1983) with BREYER & STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 931 (1979).

⁶¹ See Federal Communications Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). For a discussion of the legal interest test of standing, see J. VINING, LEGAL IDENTITY 20-33 (1978).

⁶² Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 658 (1973).

⁶³ *Data Processing*, 397 U.S. at 153-54.

⁶⁴ PIERCE, *supra* note 15, at 142.

⁶⁵ *Data Processing*, 397 U.S. at 152-53. The Court of Appeals had stated that:

[A] plaintiff may challenge alleged illegal competition when as a complainant it pursues (1) a legal interest by reason of public charter or contract, . . . (2) a legal interest by reason of statutory protection, . . . or (3) a "public interest" in which Congress has recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public.

Association of Data Processing Service Orgs. v. Camp, 406 F.2d 837, 842-43 (8th Cir. 1969).

⁶⁶ *Data Processing*, 397 U.S. at 157.

"zone of interests" test apparently restricts almost nothing.⁶⁷ The test has thus greatly liberalized standing requirements and focused both the Court's and the commentator's attention on the injury in fact requirement.⁶⁸ Both of these major shifts in standing, the general increased liberality in its application, and the focus on injury in fact, have been most visible in environmental litigation.

B. Standing in Environmental Litigation

Standing in environmental litigation follows the same basic analysis used in all standing questions.⁶⁹ The major difference lies in the comparatively slight showing courts require for plaintiffs to obtain standing in cases involving environmental issues.⁷⁰ In each area of the standing analysis, the Supreme Court has been willing to lessen the typical standing requirements. Thus, in environmental cases, the Supreme Court has readily found a congressional grant of standing to displace its own prudential limitations concerning such factors as the widespread nature of the injury. Consequently, the favored position of environmental law in standing questions has greatly promoted environmental interests and also helped to liberalize standing generally.

1. Injury in Fact Requirement

Deferential judicial behavior toward environmental litigation is evident from the relaxed injury in fact requirements in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.⁷¹ The plaintiffs in *SCRAP* were an unincorporated group of five law students who challenged an Interstate Commerce Commission (ICC) approval of a railroad rate increase that placed a surcharge on the

⁶⁷ See 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22:00 (1978).

⁶⁸ See, e.g., *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59 (1978); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972); Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1734-47 (1975).

⁶⁹ See *supra* text accompanying notes 5-68.

⁷⁰ Professor Rodgers has noted that "[i]n the space of a few years the question of standing in environmental litigation has shifted from a significant doctrinal barrier to a nettlesome technicality." W. RODGERS, ENVIRONMENTAL LAW 23 (1977).

⁷¹ 412 U.S. 669 (1973).

carrying of scrap materials.⁷² The *SCRAP* plaintiffs asserted that this rate structure promoted the use of raw materials over recycled materials, thereby increasing pollution and injuring them as users of the natural environment and breathers of the country's air.⁷³ The Court found that this was an injury sufficient to support *SCRAP*'s suit under the National Environmental Protection Act (NEPA).⁷⁴

SCRAP illustrates a number of the significant differences between standing in environmental law and standing in other litigation. First, in *SCRAP*, the Supreme Court was not disturbed by the widespread impact of the alleged injury.⁷⁵ In fact, the Court specifically found that "all persons who utilize the scenic resources of the country, and indeed *all who breathe its air*, could claim harm similar to that alleged by the environmental groups here."⁷⁶ The Court in *SCRAP* was not concerned with interfering in areas that should be left to the political branches of government under a system of separation of powers (in this case, Congress' properly delegated power to the EPA).⁷⁷

SCRAP also shows the Supreme Court's willingness to find a congressional grant of standing.⁷⁸ In an emphatic footnote, the Court dismissed any question of whether *SCRAP*'s injury fell within the

⁷² *Id.* at 678. The ICC approved a rate structure which placed a 2.5% surcharge on scrap materials thus contributing to the increased cost of using such materials. *Id.* at 676.

⁷³ The complete description of the Supreme Court's finding of *SCRAP*'s injury in fact is as follows:

It [*SCRAP*] claimed that each of its members "suffered economic, recreational and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure, as modified by the Commission's actions to date in *Ex Parte 281*." Specifically, *SCRAP* alleged that each of its members was caused to pay more for finished products, that each of its members "[u]ses the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes," and that these uses have been adversely affected by the increased freight rates, that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air has suffered increased pollution caused by the modified rate structure, and that each member has been forced to pay increased taxes because of the sums which must be expended to dispose of otherwise reusable waste materials.

Id. at 678.

⁷⁴ *SCRAP* alleged that the ICC decision to maintain the surcharge was unlawful because the ICC failed to include a detailed environmental impact statement as required by the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2)(c). *SCRAP*, 412 U.S. at 679.

⁷⁵ *SCRAP*, 412 U.S. at 687.

⁷⁶ *Id.* (emphasis added).

⁷⁷ But see *Allen v. Wright*, 468 U.S. 737, 750 (1984); Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37; Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

⁷⁸ *SCRAP*, 412 U.S. at 686 n.13.

"zone of interests" of NEPA.⁷⁹ Thus, *SCRAP* illustrates the Court's readiness to accept a small injury as sufficient to confer standing in environmental cases.⁸⁰

2. Causation Requirement

The Court has also shown a willingness to de-emphasize the causation element of standing for environmental litigation.⁸¹ In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,⁸² the plaintiffs, two environmental groups and 40 individuals who lived near the sites of two proposed nuclear power plants, challenged the Price-Anderson Act's constitutionality.⁸³ Plaintiffs claimed that the Act, which limits liability in the case of a nuclear accident to \$560 million, deprived them of their property rights without due process of law, because they could not obtain full compensation if there were a nuclear accident.⁸⁴

In *Duke*, the Court found an actual injury in two effects of the nuclear plants' operation: (1) the environmental and aesthetic consequences of the thermal pollution of two lakes in the vicinity of the disputed plants; and (2) the emission of non-natural radiation.⁸⁵ The Court based this second finding on the "generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants."⁸⁶ What makes this finding interesting, beyond the very slight and somewhat speculative harm involved, is that there appears to be no close relation, or "nexus,"⁸⁷ between the injury supporting standing and the claimed violation of the due process clause of the fifth amend-

⁷⁹ The Court stated that "[i]t is undisputed that the 'environmental interest' that the appellees seek to protect is within the interests to be protected by NEPA . . ." *Id.* at 686 n.13.

⁸⁰ The difference can be seen by comparing the results in *SCRAP* with *Warth v. Seldin*, 422 U.S. 490, 508 (1975). In *Warth*, the majority, in denying standing to various groups and nonresident individuals to challenge zoning practices that allegedly excluded low income residents, held "that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention." *Id.*

⁸¹ For a discussion of the causation element, see *Warth*, 422 U.S. at 504-08.

⁸² 438 U.S. 59 (1978).

⁸³ *Id.* at 66-67 (discussing 42 U.S.C. § 2210 (1970 ed., Supp. V)).

⁸⁴ *Duke*, 438 U.S. at 69. Obviously, plaintiffs could only be deprived of their property if an accident occurred with the resulting damages in excess of the statutory ceiling. The record indicated that the chances of this were slight.

⁸⁵ *Id.* at 73-74.

⁸⁶ *Id.* at 74.

⁸⁷ See *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

ment.⁸⁸ In previous cases, the Supreme Court had required plaintiffs to show a "logical nexus between the status asserted and the claim sought to be adjudicated."⁸⁹ Consequently, it was insufficient for plaintiffs to show that they were injured by the defendant's acts. The plaintiffs also had to show that the defendant violated some duty owed to the plaintiff.⁹⁰ Thus, the nexus requirement is equivalent to the zone of interests test⁹¹ because both the recognition of a duty toward the plaintiff and a specific statutory prohibition are intended to protect citizens from a recognizable harm.⁹² Under a nexus analysis, a court's finding of an environmental injury could not, absent the most extreme circumstances, be the basis of a fifth amendment claim.

To grant standing, and thus decide on the merits, the *Duke* Court was willing to limit the formerly pervasive nexus requirement to cases of taxpayer standing and cases concerning the rights of third parties.⁹³ Consequently, the Court found an environmental injury to be an injury sufficient to support a claim under the fifth amendment.⁹⁴ The Court was thus willing to manipulate the constitutional nexus requirement to reach the merits of an environmental case.⁹⁵

In *Duke*, the Court was also willing to relax the requirement that the standing injury be "fairly traceable" to the challenged action of the defendant.⁹⁶ Traceability differs from nexus because traceability refers to the relationship between the defendant and the plaintiff while nexus refers to the relationship between the statute and the plaintiff. The *Duke* Court accepted the District Court's finding that there was a substantial likelihood that Duke would not be able to complete the construction and maintain the operation of the nuclear plants but for the protection of the Price-Anderson Act.⁹⁷ In accepting this finding, the Court rejected the defendant's argument that the plants would be built even without the Price-Anderson limitations and, thus, the Act was not the "but for" cause of the disputed

⁸⁸ U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law").

⁸⁹ *Flast*, 392 U.S. at 102.

⁹⁰ L. TRIBE, AMERICAN CONSTITUTIONAL LAW 98 (1978).

⁹¹ See *supra* text accompanying notes 50-68.

⁹² *Data Processing*, 397 U.S. at 153-55 (1970).

⁹³ *Duke*, 438 U.S. at 78-81.

⁹⁴ *Id.* at 81.

⁹⁵ *Id.* at 78-81.

⁹⁶ *Id.* at 74-75.

⁹⁷ *Id.* at 74-75 (citing *Carolina Env'tl. Study Group, Inc. v. Atomic Energy Comm'n*, 431 F. Supp. 203, 220 (W.D.N.C. 1977)).

power plants and their alleged adverse effects.⁹⁸ The basis for the defendant's argument was that if the Act had not been passed, Congress may have chosen to construct nuclear power plants as a government monopoly.⁹⁹ The Court held that nothing in its past cases required a party to negate the kind of speculative and hypothetical possibilities suggested to demonstrate that judicial relief would be effective.¹⁰⁰

Thus, in several of its decisions, the Supreme Court has been willing to lessen the requirements of standing for plaintiffs alleging environmental injuries.¹⁰¹ In reducing the standing requirements, the Court has focused on the requirements of injury in fact, causation, and the relationship between the claimed injury and the statute or constitutional provision under which relief is sought.¹⁰² As a result, the Court has tended to discount the widespread nature of a particular injury¹⁰³ and to find more readily a congressional grant of standing that displaces the Court's own prudential limitations.¹⁰⁴

Jurists and legal scholars have long criticized the Supreme Court's practices regarding standing.¹⁰⁵ One notable critic is Justice Antonin Scalia who fundamentally disagrees with the Court's theory of standing. He enunciated this theory in a 1983 article¹⁰⁶ in which he viewed standing as an essential element of the separation of powers.

⁹⁸ *Duke*, 438 U.S. at 77-78.

⁹⁹ *Id.* at 75.

¹⁰⁰ *Id.* at 78. This holding should be contrasted with the Court's holding in *Warth v. Seldin*, 422 U.S. 490, 508 (1975); see *supra* note 79 for a discussion of *Warth's* requirements of specificity for showing a causal link between the act complained of and the alleged injury.

A stricter application of the causation requirement is seen in *Los Angeles v. Lyons*, 461 U.S. 95 (1983). There, the defendant, Lyons, was stopped for a traffic violation by police who proceeded, allegedly without provocation, to seize him and to apply a chokehold that rendered him unconscious and damaged his larynx. *Id.* at 97-98. Lyons sought injunctive relief preventing Los Angeles police from using the hold except in life-threatening situations. *Id.* at 98. The Supreme Court held that Lyons had no standing. The Court ruled that, for Lyons to establish a causal link between the act complained of and the alleged injury, he would have to show that he would have another encounter with the police, that all police always choke any citizen with whom they happen to have an encounter, and that the city authorized the police to act in such a manner. *Id.* at 105-06. These examples show that the required causal link is much less in environmental litigation.

¹⁰¹ See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

¹⁰² See *Duke*, 438 U.S. at 72-81; *SCRAP*, 412 U.S. at 683-90.

¹⁰³ *SCRAP*, 412 U.S. at 687.

¹⁰⁴ *Id.* at 646 n.13.

¹⁰⁵ See articles cited *supra* note 11.

¹⁰⁶ Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983) [hereinafter *Separation of Powers*].

III. JUSTICE SCALIA'S THEORY OF STANDING

Scalia's disagreement with the Supreme Court's current standing doctrine goes to the heart of that doctrine.¹⁰⁷ The Supreme Court has viewed the standing doctrine as having a constitutional core whose exact contours vary according to the prudential limitations set by the Court.¹⁰⁸ Scalia, however, states that the existence of standing is largely within the control of Congress in that Congress can create individual legal rights that the judiciary must then enforce.¹⁰⁹ When Congress creates such a right, the courts must hear the case.¹¹⁰ Prudential limitations come into effect where, for example, Congress requires the executive to implement a general welfare program for the benefit of the majority.¹¹¹ In such cases, the prudential limitations act as a set of presumptions derived from the common law. These presumptions determine if a legal right exists.¹¹² Congress can displace this latter inquiry by explicitly granting standing, provided that the grant does not provide standing when the constitutional requirement of particularized injury is not met.¹¹³

There is more to Scalia's dissatisfaction with the current standing doctrine, however, than a dispute over the internal workings of the Court's analysis of the standing doctrine. Scalia has also found fault with the Court's "readiness" to imply a congressional grant of standing in a particular statute where no explicit grant exists.¹¹⁴

The most important example of this "liberalization"¹¹⁵ of the standing doctrine appears in the current interpretation the Supreme Court has given the judicial review provisions of the Administrative Procedure Act (APA).¹¹⁶ Scalia disputes the liberalized gloss placed on the APA by the zone of interests test.¹¹⁷ He has read the APA as

¹⁰⁷ *Id.* at 885. The next section is based mainly on Scalia's 1983 standing article. The purpose of relying primarily on Scalia's articles instead of his opinions on the District of Columbia Court of Appeals is to highlight the distinction between Scalia's pure theoretical perspective and the manner in which that perspective is put into practice. The tensions inherent between Justice Scalia's twin roles of scholar and jurist could modify his practical approach to jurisprudential problems during his tenure on the Supreme Court.

¹⁰⁸ See *supra* text accompanying notes 5-49.

¹⁰⁹ *Separation of Powers*, *supra* note 106, at 885.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 886.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 887.

¹¹⁶ 5 U.S.C. § 702 (1982).

¹¹⁷ *Separation of Powers*, *supra* note 106, at 888-89 (citing *Data Processing*, 397 U.S. at 154-55). See *supra* text accompanying notes 63-68.

only granting standing where there was a previously recognized legal wrong or where there was a specific congressional grant of standing.¹¹⁸ In short, although Scalia has agreed that Congress has the ability to displace the courts' prudential limitations,¹¹⁹ he has said that the Court has found such displacements where Congress never intended them.¹²⁰ Thus, for Scalia, the Supreme Court's behavior has "transmogrified" already liberalized grants of standing "into an affirmative grant of standing in 'all situations in which a party who is in fact aggrieved seeks review, regardless of a lack of legal right or specific statutory language.'"¹²¹

The gist of Scalia's disagreement with the present standing doctrine concerns the change in the judiciary's role resulting from these new liberalized rules of standing.¹²² Standing, for Scalia, functions to restrict courts to their traditional role of protecting individuals and minorities against what has customarily been termed the "tyranny of the majority."¹²³ Standing does this by ensuring that the plaintiff is either the object of the law's requirement or prohibition, or suffers some "concrete injury" as a direct result of that law.¹²⁴ It is in this manner that standing functions as a mechanism to maintain the separation of powers.¹²⁵ Such a view is consistent with the basic tenets of judicial restraint. These basic tenets seek to limit the role of the courts in relation to the other branches of government.¹²⁶

This self-governing mechanism of standing operates on a number of different levels. Scalia starts from the premise that there are certain areas in which the courts should not be involved.¹²⁷ One such area is that of the political negotiation found within the rulemaking process of administrative law.¹²⁸ For Scalia, some agency decisions

¹¹⁸ *Separation of Powers*, *supra* note 106, at 887.

¹¹⁹ *Id.* at 886.

¹²⁰ *Id.* (citing *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (Federal Power Act provision of right to review for aggrieved parties held to give standing to those who by their activities and conduct have exhibited a special interest in the aesthetic, conservational, and recreational aspects of power development)).

¹²¹ *Separation of Powers*, *supra* note 106, at 889 (citing *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 872 (D.C. Cir. 1970)).

¹²² *Separation of Powers*, *supra* note 106, at 890-93.

¹²³ *Id.* at 894.

¹²⁴ *Id.* at 894-95.

¹²⁵ *Id.* at 890-93. This view is not without support. See *Allen v. Wright*, 468 U.S. 737 (1984). See also, Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37.

¹²⁶ Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 11-12 (1983).

¹²⁷ See *Separation of Powers*, *supra* note 106, at 889.

¹²⁸ Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. v, v (1982).

are made merely because they are what the majority wants, at least as those wants are reflected in the political processes, and are not necessarily based on any other rational explanation.¹²⁹ Standing, according to Scalia, should function to insure that the courts are not able to alter this type of political decisionmaking. As Scalia explains this function:

The doctrine of standing . . . was almost tailor-made to protect political discretion. It is rudimentary political science that slight harm, expense or inconvenience imposed on a large, diffuse body of the population will generally not arouse effective political opposition. But diffuseness, expansiveness, lack of particularity was what the doctrine of standing was all about. In other words, it excluded from the courts *precisely* those interests that were likely to lose in a rulemaking proceeding with substantial political content—the potential hikers and campers who would be harmed by construction of a new ski resort, to take a real life example.¹³⁰

Scalia therefore has concluded that the trend of judicial and legislative liberalization of standing has removed the barriers that confine the courts to protecting only minority rights.¹³¹

Scalia has contended that another reason for the courts to stay out of these “majoritarian” processes is the judiciary’s inability to promote majority interests.¹³² For Scalia, the judiciary, because of their training, typically upper-middle class background, and unaccountability tend to not do “what is good for the people” but instead tend to enforce the political prejudices of their own class.¹³³ Scalia gives the following example of this type of behavior:

Their greatest success in such an enterprise—ensuring strict enforcement of the environmental laws, not to protect particular minorities but for the benefit of all the people—met with approval in the classrooms of Cambridge and New Haven, but not in the factories of Detroit and the mines of West Virginia. It may well be, of course, that the judges know what is good for the people better than the people themselves; or that democracy simply does not permit the *genuine* desires of the people to be given effect; but those are not the premises under which our system operates.¹³⁴

¹²⁹ *Id.* at v–vi.

¹³⁰ *Id.* at vi (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

¹³¹ See *Separation of Powers*, *supra* note 106, at 892–93.

¹³² *Id.* at 896.

¹³³ *Id.* See also, B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 174–75 (1921) (“The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place”).

¹³⁴ *Separation of Powers*, *supra* note 106, at 897.

Thus, according to Scalia, even if judges are correct, they should only become involved in assuring the regularity of agency action when such assurance is incidental to deciding the rights of individuals.¹³⁵ It is not the courts' duty "to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."¹³⁶ On the contrary, Scalia has viewed the executive branch's ability to lose or misdirect laws as a prime component of social change, and thus any judicial attempts to prevent this are "profoundly conservative."¹³⁷

In short, the traditional function of standing has been to enforce the separation of powers by ensuring that the courts are not converted into a forum for political debate, open to all, to address any issue.¹³⁸ By excluding all persons from bringing a particular issue before the court, lack of standing thus necessarily excludes that issue from judicial resolution.¹³⁹ Therefore, Scalia has supported this traditional function of standing. He has viewed standing as a tool of judicial self-restraint because its usefulness arises from its ability to limit the power of the courts.

For Scalia, the key to standing's function of enforcing separation of powers arises from the necessity of a concrete injury.¹⁴⁰ A concrete injury is an essential requirement according to Scalia because it separates the injured party from all others who claim a benefit from the social contract.¹⁴¹ The social contract refers only to the basic philosophical idea that society formed as a mutually advantageous cooperative venture with rules that restrict liberty in such a way as to yield advantages for all.¹⁴² Many commentators have viewed the social contract as encompassing only the provision and allocation of

¹³⁵ *Id.* at 884 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

¹³⁶ *Separation of Powers*, *supra* note 106, at 884 (quoting *Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971)). *Calvert Cliffs* held, in part, that the courts have the power to require agencies to comply with procedural directions of National Environmental Policy Act of 1969. 449 F.2d at 1114-15.

¹³⁷ *Separation of Powers*, *supra* note 106, at 897. This substitution of a normally conceived conservative viewpoint with a normally conceived liberal viewpoint is a common rhetorical device employed by Justice Scalia. For an interesting discussion of the way in which judges employ language see Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor With an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982).

¹³⁸ See *Separation of Powers*, *supra* note 106, at 892.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 895.

¹⁴¹ *Id.*

¹⁴² J. RAWLS, A THEORY OF JUSTICE 112 (1971). See generally J. ROUSSEAU, THE SOCIAL CONTRACT (1762); J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT (1714).

material advantages.¹⁴³ Therefore, according to these commentators, injury in fact limits governmental control to the terms of the social contract by ensuring that the courts cannot enforce particular ideological preferences. Because, however, the concrete injury is a violation of the terms of the social contract, the injured party is entitled to special protection from the democratic manner in which social-contractual affairs are normally handled.¹⁴⁴ This special protection is, of course, the province of the courts.

Scalia has also stated, however, that although necessary, concrete injury in and of itself is not enough for standing; the plaintiff must also establish minority status relevant to the particular government transaction from which the alleged injury arose.¹⁴⁵ Therefore, according to Scalia, not all concrete injuries would be capable of supporting a congressional conferral of standing.¹⁴⁶ He has stated that there are injuries that are so widely shared that even a specific congressional provision protecting against that harm would not define a proper minority capable of invoking judicial protection.¹⁴⁷ As an example of such a widespread injury, Scalia has cited the Supreme Court's finding in *SCRAP*¹⁴⁸ of an injury to all who breathe the

¹⁴³ For example, Professor Stewart explains the relationship between injury in fact and the social contract as follows:

The ultimate ground of the "injury in fact" test reminiscent of the common law's focus on the protection of material interests, may be in the contractarian theory of government. Put simply the theory is this: the justification for government lies in individuals' willingness to assent to a scheme of mutual cooperation that increases individuals' opportunity to satisfy their preferences. Social action, when limited to the provision and allocation of material advantages, requires no general agreement on personal preferences or values. So long as only material interests are accorded protection by law, rules can be formulated which will enable each individual to pursue his own ends through a system of reciprocity that increases wealth, leisure, and the like, thus enlarging material opportunities for all. If ideological interests are accorded legal protections, however, two basic difficulties emerge. First, ideological interests . . . often have an all or nothing feature If several conflicting ideological interests are accorded recognition, or even one ideological interest that conflicts with material interests, it may be impossible to achieve stable compromise. Second, vindication of a litigant's ideological preferences may require others to acknowledge principles which they reject. But such enforced orthodoxy is contrary to contractarian premises; an agreement to share the fruits of cooperative endeavor is not an undertaking to embrace another's ideology.

Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1739 (1975) (citations omitted).

¹⁴⁴ *Separation of Powers*, *supra* note 106, at 895.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 895-96.

¹⁴⁸ 412 U.S. at 687.

country's air as the type of injury that should not be capable of supporting standing to sue.¹⁴⁹ It seems, therefore, that Scalia would shift consideration of the widespread nature of the injury from its place as a discretionary prudential consideration to a core requirement of article III.¹⁵⁰

Accordingly, Scalia believes that the current dysfunctional state of the standing doctrine is directly related to the lessening of judicial focus on the requirement of a concrete, particularized injury that sets the claimant apart from the citizenry as a whole.¹⁵¹ Scalia has contended that liberalization of standing has affected two great changes in the judicial system.¹⁵² First, it has given courts the ability to address issues that were previously beyond the scope of their powers.¹⁵³ Second, the liberalized standing rules have also given courts the ability to address issues promptly at the behest of almost anyone.¹⁵⁴ The courts are thus now a key component of any public debate because of the prompt access that they afford to airing political issues.¹⁵⁵

This combination of breadth and immediacy of judicial review, Scalia has stated, has directly resulted in the "overjudicialization of the processes of self-governance."¹⁵⁶ Such a view represents Scalia's adherence to the philosophy of judicial self-restraint, which sets, as an important goal of judicial decisionmaking, the reduction in the power of the courts in relation to the other branches of government.¹⁵⁷ A judge accomplishes this reduction by deferring to the decisions of Congress and the administrative agencies.¹⁵⁸ This deference can take one of two forms. First, a judge can defer to the merits of a case by finding that another branch of government has already decided the issue.¹⁵⁹ Alternatively, the judge can restrict the court's ability to decide issues by tightening up access to judicial review by strict enforcement of procedural rules. Scalia's entire theory of standing can thus be seen as an embodiment of this second method of judicial self-restraint. Scalia seeks to trim the power of the courts

¹⁴⁹ *Separation of Powers*, *supra* note 106, at 896.

¹⁵⁰ U.S. CONST. art. III, § 2.

¹⁵¹ *Separation of Powers*, *supra* note 106, at 881-82.

¹⁵² *See id.* at 892-93.

¹⁵³ *Id.* at 892.

¹⁵⁴ *Id.* at 892-93.

¹⁵⁵ *Id.* at 893.

¹⁵⁶ *Id.* at 881.

¹⁵⁷ *See* R. POSNER, *THE FEDERAL COURTS* 208 (1985).

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*

by limiting the type of litigants, and therefore the type of issues, that the courts can hear.

Scalia has suggested that this trimming of the courts' power through standing can be accomplished in three ways.¹⁶⁰ First, the courts should strictly adhere to the requirement of a distinctive and particularized injury that distinguishes the plaintiff from the population as a whole.¹⁶¹ Second, the courts should refrain from discerning broad congressional grants of standing unless such grants are explicit.¹⁶² Even with an explicit grant, however, the courts must insure that legislative conferrals of standing do not infringe upon the constitutional core requirement of a concrete and particularized injury.¹⁶³ Finally, the judiciary must recognize the original meaning and intent of the APA's definitional phrase "adversely affected or aggrieved within the meaning of a relevant statute" to insure that standing is not expanded any further.¹⁶⁴

Functionally, Scalia has viewed standing as a constraint on the judiciary's ability to usurp the functions of the other branches of government. His theory thus stresses the limited nature of the courts' role in solving societal problems. For Scalia, judicial decisionmaking is only proper and useful to protect a minority interest that would lose in the democratic processes. Where, however, an injury or burden is dispersed over most or all of the population, Scalia's position has been that it is impracticable that all should be able to directly voice their concern by resort to the judiciary.¹⁶⁵ In a complex society, such rights are protected by the people's power over the elected official, or as Scalia would say, the democratic processes.¹⁶⁶

Scalia's espoused standing theory could have a great impact on standing to sue in environmental litigation. Where the harm is widespread and individually minimal, as in many environmental cases, it

¹⁶⁰ *Separation of Powers*, *supra* note 106, at 897-99.

¹⁶¹ *See id.* at 898.

¹⁶² *See id.*

¹⁶³ *See id.* at 896.

¹⁶⁴ *See id.* at 898-99.

¹⁶⁵ This theory is analogous to Justice Holmes' analysis in *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), of when a hearing was necessary to meet the requirements of due process. In that case, Holmes held that a hearing was only required where government action affected a relatively small number of persons in an exceptional manner and in each case upon individual grounds. *Id.* at 446. This concept is akin to Scalia's requirement of a concrete injury that sets the plaintiff apart from the population as a whole. *See Separation of Powers*, *supra* note 106, at 894-95. Both Holmes' construction and Scalia's theory of standing recognize a limited applicability and utility for judicial-type resolutions.

¹⁶⁶ *Separation of Powers*, *supra* note 106, at 896.

may be impossible to find someone who is sufficiently and specifically harmed to satisfy Scalia's high threshold of injury in fact. This is one reason why environmental law, as both a main beneficiary of, and the main driving force behind the liberalized standing trend,¹⁶⁷ could suffer from a Scaliaesque standing doctrine.

The obvious disdain that Scalia shows for the grants of standing in environmental cases¹⁶⁸ should raise concern among environmentalists as to whether he will be instrumental in restricting future access to the courts for environmental plaintiffs. Further, in a 1984 decision, the Supreme Court denied standing to parents of black school children who alleged that the Internal Revenue Service had not adopted sufficient standards to deny tax-exempt status to racially discriminating private schools.¹⁶⁹ The Court held that requirements of standing are to be interpreted in reference to separation of powers principles.¹⁷⁰ Although Scalia was not on the Court when that opinion was written, such an analysis echoes Scalia's own theoretical base and thus indicates that he might have some support on the Supreme Court for restricting judicial review.¹⁷¹ Finally, at least one commentator has noted a conservative trend in recent Supreme Court environmental law decisions¹⁷² decided before Scalia joined the Court. This trend could be augmented by the addition of the judicially conservative Scalia. It is instructive to focus on these concerns through an analysis of Scalia's standing theory during his tenure on the District of Columbia Court of Appeals. From this foundation in Scalia's judicial opinions, it will be possible to explore his potential effect on future environmental litigation.

IV. JUSTICE SCALIA AND STANDING: PRACTICAL APPLICATION OF HIS THEORY

During his term on the District of Columbia Court of Appeals, Justice Scalia wrote a substantial number of opinions concerning

¹⁶⁷ See *supra* text accompanying notes 69-105.

¹⁶⁸ See *supra* text accompanying notes 130 & 134.

¹⁶⁹ *Allen v. Wright*, 468 U.S. 737, 739 (1984).

¹⁷⁰ *Id.* at 752.

¹⁷¹ Of the Justices who made up the *Allen* majority, Chief Justice Rehnquist, Justice White, and Justice O'Connor are still on the Court.

¹⁷² *The Supreme Court and Environmental Law: A Whole New Ballgame?*, 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,262 (July, 1984).

standing.¹⁷³ The large number alone indicates the doctrine's importance to Scalia and his use of that doctrine to enforce his policy of judicial restraint. Although Scalia's tenure on the Court of Appeals was too short to draw any definite conclusions concerning trends that may have developed over time, it is safe to say that Scalia's early standing opinions adhered much more closely to his theoretical base than his more recent opinions.¹⁷⁴ Such time-based factors, however, only partially reveal what appears to be a trend away from Scalia's own doctrinal theory of standing. Four exemplary cases will serve to illustrate these changes. These decisions, despite the move away from his theoretical stance, still indicate that Scalia may not be favorably disposed to most environmental interests. The reason for this position, however, is not that he is anti-environmental, but rather because such a position is a necessary adjunct of his main policy of judicial self-restraint. In other words, Scalia's decisions in

¹⁷³ Scalia sat on the District of Columbia Court of Appeals from 1982 until his appointment to the Supreme Court in 1986. He wrote eighteen opinions on the issue of standing. *Aluminum Co. of America v. United States*, 790 F.2d 938 (D.C. Cir. 1986); *Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322 (D.C. Cir. 1986) (Scalia, J., dissenting); *In re Center for Auto Safety*, 793 F.2d 1346 (D.C. Cir. 1986) (Scalia, J., dissenting); *Thomas v. New York*, 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987) (Scalia, J., took no part in the consideration of the petitions for certiorari); *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986); *FAIC Securities, Inc. v. United States*, 768 F.2d 352 (D.C. Cir. 1985); *Securities Industry Ass'n v. Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir. 1985) (per curiam, Scalia, J., dissenting from the court's finding of standing), *aff'd in part rev'd in part*, 107 S. Ct. 750 (1987) (Court affirmed grant of standing but reversed on the merits; Scalia, J., took no part in the consideration of the case); *Center for Auto Safety v. Ruckelshaus*, 747 F.2d 1 (D.C. Cir. 1984); *New England Coalition on Nuclear Pollution v. Nuclear Regulatory Comm'n*, 727 F.2d 1127 (D.C. Cir. 1984); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (Scalia, J., dissenting), *vacated*, 471 U.S. 1113 (1985); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984); *Community Nutrition Institute v. Block*, 698 F.2d 1239 (D.C. Cir. 1983) (Scalia, J., concurring in part and dissenting in part), *rev'd*, 467 U.S. 340 (1984); *National Coalition to Ban Handguns v. Bureau of Alcohol, Tobacco & Firearms*, 715 F.2d 632 (D.C. Cir. 1983); *Safir v. Dole*, 718 F.2d 475 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984); *Sea-Land Service, Inc. v. Dole*, 723 F.2d 975 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 824 (1984); *Covelo Indian Community v. Watt*, Nos. 82-2377, 82-2417, slip op. (D.C. Cir. Dec. 21, 1982) (LEXIS, Genfed library, USAPP file) (per curiam, Scalia, J., dissenting).

¹⁷⁴ Such trends are uncertain for a number of reasons. First, there are no factually similar cases that occur in both his earlier and later years. Such a lack of "benchmarks" makes it difficult to discount other variables that may have influenced a particular decision. More importantly for our purposes, the cases which concern standing in environmental litigation came within Scalia's last year on the Court of Appeals, making it impossible to isolate any changes which are a function of his length of time on the bench. Consequently, this note will limit itself to discussing only the most broadly obvious time-based trends.

environmental litigation will not be dictated by whether he favors environmental interests, but by how the decision promotes his own judicial agenda.

A. *Covelo Indian Community v. Watt: Justice Scalia's Theory in Practice*

Scalia's earliest opinion on standing, *Covelo Indian Community v. Watt*,¹⁷⁵ is a textbook example of his standing theory. In *Covelo*, Scalia dissented from the Court of Appeals' grant of standing to the plaintiffs, an Indian group who brought suit in federal district court seeking declaratory and mandatory injunctive relief for the Department of the Interior's failure to act as required by federal statute.¹⁷⁶ The statute required the Secretary of the Interior, after consultation with the Attorney General, to submit to Congress by December 31, 1982, legislative proposals to resolve certain Indian claims that the Secretary and Attorney General felt were inappropriate to resolve by litigation.¹⁷⁷ Although the Bureau of Indian Affairs (BIA) identified approximately 17,000 Indian claims, the Departments of Interior and Justice rejected almost all as inappropriate for litigation and submitted only two legislative proposals to Congress.¹⁷⁸

On the issue of standing, the government argued that the Indian group did not meet the article III requirements because: (1) they did not suffer the requisite injury in fact, and (2) there was no likelihood that the relief requested would redress any of the Indians' claimed injuries.¹⁷⁹ The plaintiffs countered that they had standing

¹⁷⁵ *Covelo Indian Community v. Watt*, No. 82-2377, 82-2417, slip op. (D.C. Cir. Dec. 21, 1982) (LEXIS, Genfed library, USAPP file) (per curiam, Scalia, J., dissenting).

¹⁷⁶ *Covelo*, slip op., majority opinion (referring to 28 U.S.C. § 2415 (1982)).

¹⁷⁷ *Covelo*, slip op., majority opinion. 28 U.S.C. § 2415 imposed a statute of limitations on certain actions brought by the United States as plaintiff. The original statute did not specifically discuss claims brought by the United States, as trustee, on behalf of Indian groups. The United States holds the Indians' land in either trust or restricted status and is required to bring actions on their behalf in disputes concerning that land. Since concern was expressed as to whether the statute involved included suit by the United States in this capacity, Congress amended the statute to specifically include Indian claims and to extend the time period for filing those actions. In pertinent part, the statute provided that:

Not later than [December 31, 1982], the Secretary of the Interior, after consultation with the Attorney General, shall submit to the Congress legislative proposals to resolve those Indian claims subject to the amendments made by the first section of this Act that the Secretary of the Interior or the Attorney General believes are not appropriate to resolve by litigation.

28 U.S.C. § 2415.

¹⁷⁸ *Covelo*, slip op., majority opinion.

¹⁷⁹ *Covelo Indian Community v. Watt*, 551 F. Supp. 366, 379-80 (D.D.C. 1982).

under the APA¹⁸⁰ to challenge defendant's conduct under the statute because the plaintiffs were within the "zone of interests" protected by that statute.¹⁸¹ In affirming the District Court's decision, the Court of Appeals agreed that the plaintiffs had standing to enforce the statute's mandate requiring the Secretary to submit legislative proposals to resolve nonlitigated claims.¹⁸²

The majority in *Covelo* held that the plaintiffs' injury, the failure of the Departments of Justice and Interior to press Indian claims, was within the "zone of interests" protected by the statute.¹⁸³ The court thus held that no bar existed to the plaintiffs' claim based on prudential considerations.¹⁸⁴ The court rejected the government's article III argument that the plaintiffs had not shown a sufficient likelihood of redress for their injury because their only injury was failure to receive monetary relief for their claims.¹⁸⁵ Instead, the court stated that the plaintiffs had a statutory right to have their trustee bring their claims in an appropriate forum, or, in lieu of litigation, in the form of a legislative proposal.¹⁸⁶

The majority held, therefore, that the government's refusal to provide assistance deprived the Indian group of a legally cognizable right whose connection to final resolution of their underlying damage claims was established by Congress.¹⁸⁷ Thus, the *Covelo* court characterized the case as an example of "the well-established rule that when the Constitution or a statute confers procedural rights on certain persons, those persons have standing to insist that the government follow proper procedures in reaching a substantive decision. . . ."¹⁸⁸ In *Covelo*, the connection between the relief sought and

¹⁸⁰ 5 U.S.C. § 702 (1982).

¹⁸¹ *Covelo*, 551 F. Supp. at 380.

¹⁸² *Covelo*, slip op., majority opinion.

¹⁸³ *Id.*

¹⁸⁴ The court stated that "[g]iven Congress' direct order to the Secretary to submit legislation, the government's special fiduciary relationship to the Indians, and Congress' purpose to resolve the claims justly and equitably, prudential considerations favor finding that appellees have standing to enforce the congressional mandate." *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* The government cited *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), to argue that the deprivation of such a procedural benefit is not connected closely enough to the tangible injury to meet the standing requirements. *Id.* The court rejected this argument by narrowly reading *Simon* to hold only "that unless a plaintiff can show that a different substantive result from a government defendant will likely bring about the redress of its substantive injury, it has no standing to raise a procedural challenge that may lead to that substantive result." *Id.*

the injury was clear.¹⁸⁹ The court found that the statute manifested congressional intent that the Department use its knowledge and resources to help the Indians resolve their claims.¹⁹⁰ The plaintiffs' injury according to the court was the loss of that help and was, therefore, redressable by an order requiring the Department to submit legislative proposals.¹⁹¹

Based on the Supreme Court's then current position on standing, the majority's opinion appears to be the proper result. First, the *Covelo* court's liberal reading of the "zone of interests" test is consistent with the Supreme Court's own reading of that test.¹⁹² Second, the court also followed the Supreme Court's expansive reading of the judicial review provisions of the APA.¹⁹³ Using such a reading, the *Covelo* court found that the Department of the Interior's failure to submit legislative proposals, as they were required to do, was sufficient to constitute agency action that aggrieved or adversely affected the plaintiffs.¹⁹⁴ Finally, because Congress created a specific procedure to benefit plaintiffs, and because that procedure was not utilized, the plaintiffs were sufficiently injured for standing purposes by being deprived of that statutory right.¹⁹⁵

Scalia, however, viewed this situation somewhat differently and thus dissented from the court's finding of standing.¹⁹⁶ Although his dissent presents a logically persuasive argument, the rightness or wrongness of his views are not the important issue. What makes Scalia's dissent interesting is that it presents almost the same purely theoretical view of standing that he presented in his 1983 article on the subject of standing.¹⁹⁷

Scalia began his dissent by stating that "[t]he Constitution permits the courts . . . to sit in judgment upon the handiwork of the coordinate branches of government only when the 'case or controversy' requirements of article III are satisfied."¹⁹⁸ This statement is a clear reworking of the idea found in his *Separation of Powers* article.¹⁹⁹

¹⁸⁹ *Covelo*, slip op., majority opinion.

¹⁹⁰ *Id.* (discussing 28 U.S.C. § 2415 (1982)).

¹⁹¹ *Covelo*, slip op., majority opinion.

¹⁹² See *Data Processing Services Orgs. v. Camp*, 397 U.S. 150, 153-54 (1970).

¹⁹³ 5 U.S.C. § 702 (1982). For an example of this expansive reading, see *Data Processing*, 397 U.S. at 153-54.

¹⁹⁴ *Covelo*, slip op., majority opinion.

¹⁹⁵ See *Data Processing*, 397 U.S. at 153.

¹⁹⁶ *Covelo*, slip op., dissenting opinion.

¹⁹⁷ See *Separation of Powers*, *supra* note 106.

¹⁹⁸ *Covelo*, slip op., dissenting opinion.

¹⁹⁹ *Separation of Powers*, *supra* note 106.

In *Separation of Powers*, Scalia wrote that courts should only “assure the regularity of executive action” as an incidental effect of deciding on the rights of individual litigants.²⁰⁰ Both the article and the *Covelo* dissent view standing functionally as a tool to protect separation of powers. Moreover, a deeper analysis of his *Covelo* dissent reveals both a strongly conservative view of standing and an almost direct application of his theoretical view of standing to the facts of this particular case.²⁰¹

The tone of Scalia’s *Covelo* dissent manifests his strong disagreement with the majority’s finding of standing. Scalia’s dissent uses the phrase “sit in judgment” to criticize the majority’s behavior by making reference to substantive due process and the rejected role of the court as a “superlegislature.”²⁰² Further, Scalia juxtaposes this statement with the word “handiwork,” which is defined as a personal or individual achievement.²⁰³ Here, Scalia seemed to be saying that the executive’s non-enforcement of the statute requiring them to submit legislative proposals was within the executive’s discretion and that the court’s action was based merely on a disagreement over the proper policy to follow in Indian claim cases. As such, the court, according to Scalia, usurped the executive’s proper policymaking role and thus violated the principles of separation of powers.²⁰⁴ Such behavior is antithetical to Scalia’s philosophy of judicial self-restraint.

The *Covelo* dissent also reveals Scalia’s use of a stricter injury in fact standard for establishing standing.²⁰⁵ Scalia’s basic thesis in the dissent was that there was no injury in the article III sense, because the claimed injury was unlikely to be redressed or remedied by the relief requested.²⁰⁶ Scalia, therefore, saw the Indians’ inability to win on their claims as their only injury.²⁰⁷ Scalia thus did not recognize any judicially reviewable injury resulting from the Department of the Interior’s initial refusal to carry out the statutorily mandated procedure specifically enacted to benefit the appellees.²⁰⁸

²⁰⁰ See *id.* at 883–84 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

²⁰¹ See *Covelo*, slip op., dissenting opinion.

²⁰² See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

²⁰³ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1027 (1981).

²⁰⁴ See *Covelo*, slip op., dissenting opinion.

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *id.* Scalia goes on to say in his dissent that the duty imposed on the Department of the Interior may itself have been unconstitutional on separation of powers grounds. It seems reasonable to argue that either: (1) Scalia transposed the separation of powers infirmities of

Instead, he stated that "[n]either on our own authority nor by congressional directive may we undertake to adjudicate a claim which does not present an injury in fact to the plaintiffs. . . ." ²⁰⁹ For Scalia, this situation involved nothing more than keeping the courts out of an area involving political discretion. ²¹⁰ In his critical view, the majority "[saw] that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." ²¹¹ In other words, the majority was treading where they did not belong. Scalia's *Covelo* dissent, by denying standing to sue concerning an affirmative governmental duty, thus established a high threshold for what constitutes injury in fact.

Moreover, Scalia's dissent in *Covelo* indicates that he was not as ready as the majority to find a congressional grant of standing. He stated that: "It is enough to note that if Congress can create an 'injury in fact' by merely saying that a particular class has a 'right' to have something done, the case or controversy clause will have been transformed from a constitutional imperative to a statutory option." ²¹² Therefore, for Scalia, the injury cannot merely consist of the denial of a statutory right. The injury must still meet the strictures of article III. ²¹³

In his *Covelo* dissent, Scalia closely adhered to several of his theoretical bases. ²¹⁴ First, he demanded a high level of injury to meet the article III requirements. ²¹⁵ Second, he indicated that courts should stay out of what he termed the political discretion involved in executive action, even if there was such a showing of injury. ²¹⁶ Finally, Scalia was not willing to find a congressional conferral of standing absent the type of injury that he viewed as essential for standing. ²¹⁷ *Covelo* thus represents Scalia's strict reading of the standing requirements.

the statute onto the question of standing, or (2) Scalia used standing to dismiss the appeal because he did not want to get to the unraised question of the unconstitutionality of the statute. Either way, the opinion manifests an early recognition by Scalia of the extra-judicial uses of the standing doctrine. See PIERCE, *supra* note 15, at 143.

²⁰⁹ *Covelo*, slip op., dissenting opinion.

²¹⁰ See Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. v, v (1982).

²¹¹ *Separation of Powers*, *supra* note 106, at 884 (quoting Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971)).

²¹² *Covelo*, slip op., dissenting opinion.

²¹³ U.S. CONST. art. III, § 2.

²¹⁴ See *Covelo*, slip op., dissenting opinion.

²¹⁵ See *id.*; see *Separation of Powers*, *supra* note 106, at 898.

²¹⁶ See *Covelo*, slip op., dissenting opinion; see also Scalia, *Rulemaking as Politics*, *supra* note 210, at v.

²¹⁷ See *Covelo*, slip op., dissenting opinion; see also *Separation of Powers*, *supra* note 106,

B. Center for Auto Safety v. Ruckelshaus and Thomas v. New York: Justice Scalia's Theory in Environmental Cases

The standing issue was also present in both of the environmental cases for which Scalia wrote opinions while on the Court of Appeals.²¹⁸ In these opinions, Scalia could have addressed the reduced requirements of injury in fact that had been used in environmental litigation. Instead of asserting his stricter requirements for injury in fact, however, Scalia adhered to the favored position of environmental litigation.²¹⁹ He thus found standing for injuries that were insufficient to support standing under his prior analysis.²²⁰

For example, Scalia's opinion in *Center for Auto Safety v. Ruckelshaus*,²²¹ evidenced a radical departure from his previous view of standing. *Center for Auto Safety* concerned section 207 of the Clean Air Act.²²² Section 207 directs the Administrator of the Environmental Protection Agency (EPA) to require manufacturer submission of a plan to remedy nonconformance with maximum emission standards.²²³ Until this case, the EPA had required and had only approved plans that committed auto manufacturers to recall and repair nonconforming vehicles.²²⁴

In carrying out section 207, the EPA tested a particular engine group of General Motors (GM) automobiles.²²⁵ All the cars exceeded the maximum emissions standards, and the EPA ordered GM to submit a plan for remedying the nonconformity.²²⁶ Instead of submitting a plan for recall and repair of the 1979 vehicles, GM submitted a plan that proposed engineering the 1982 and 1983 engine families to meet a target lower than mandatory emission standards.²²⁷ GM claimed that this offset plan would achieve emissions

at 892-93. It must be remembered that Scalia also views injuries which do not place the plaintiff within a distinct minority as insufficient to confer standing and thus such parties are incapable of invoking judicial protection. *Id.* at 894-95.

²¹⁸ *Thomas v. New York*, 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987) (Scalia, J., took no part in the consideration of the petitions for certiorari); *Center for Auto Safety v. Ruckelshaus*, 747 F.2d 1 (D.C. Cir. 1984).

²¹⁹ See *Center for Auto Safety*, 747 F.2d at 3 n.2; *Thomas*, 802 F.2d at 1445-46. See also *supra* text accompanying notes 69-104, for a discussion of standing in environmental litigation.

²²⁰ See *Center for Auto Safety*, 747 F.2d at 3 n.2; *Thomas*, 802 F.2d at 1445-46. See also *supra* text accompanying notes 106-172 for a discussion of Justice Scalia's standing theory.

²²¹ 747 F.2d 1 (D.C. Cir. 1984).

²²² See *id.* at 2.

²²³ 42 U.S.C. § 7541(c)(1) (1982).

²²⁴ *Center for Auto Safety*, 747 F.2d at 2.

²²⁵ *Id.* at 3.

²²⁶ *Id.*

²²⁷ *Id.*

benefits equal to recall and repair.²²⁸ The EPA accepted the plan and published a notice of its decision.²²⁹ Center for Auto Safety, two other non-profit organizations, and three private individuals petitioned the Court of Appeals for review of the EPA's decision.²³⁰ The petitioners claimed that the EPA's action was unlawful because the offset plan did not remedy the nonconformity within the meaning of section 207, and that repair and recall was the only acceptable remedy under the statute.²³¹

The facts in *Center for Auto Safety* describe the type of case where Scalia had previously criticized other courts for granting standing.²³² Even if EPA approval of the plan would lead to higher emissions, the injury would be of such a widespread nature that it would fail to carve out a minority capable of invoking judicial protection.²³³ Further, EPA approval of a plan is the type of agency decision that contains a certain amount of political discretion, which is an area where, according to Scalia, the courts should not intrude.²³⁴ Therefore, *Center for Auto Safety* presents for Scalia the type of situation where a court should not be ready to read a congressional conferral of standing.²³⁵

Yet, in his majority opinion, Scalia dismissed the question of standing in a footnote.²³⁶ He went on to hold that section 207 requires recall and repair as the only statutory remedy for nonconformity.²³⁷ Therefore, he found that the EPA had acted unlawfully in accepting GM's offset plan.²³⁸

²²⁸ *Id.* GM's rationale for using this plan was that it would save the company \$11.8 million and would save 1979 vehicle owners \$25.8 million in fuel costs, since the originally proposed remedy would have caused increased fuel consumption. *Id.*

²²⁹ *Id.* (citing Motor Vehicle Recalls under the Clean Air Act, 47 Fed. Reg. 38,189 (1982)).

²³⁰ *Center for Auto Safety*, 747 F.2d at 3 n.2. Under 42 U.S.C. § 7607(b)(1) (1982), such petitions for review must be filed directly with the Court of Appeals of the District of Columbia.

²³¹ *Center for Auto Safety*, 747 F.2d at 3.

²³² *See id.* at 2-4.

²³³ *See Separation of Powers*, *supra* note 106, at 895-96.

²³⁴ *See Scalia, Rulemaking as Politics*, *supra* note 210 at v. Viewing EPA plan approval as political discretion is supported by the fact that the approval of state implementation plans for conforming to natural air quality standards under the Clean Air Act, 42 U.S.C. § 7410 (1982), is a discretionary act of the administrator and therefore not subject to the Clean Air Act's citizen suit provision, 42 U.S.C. § 7604 (1982). *See West Penn Power Co. v. Train*, 378 F. Supp. 941, 944 (W.D. Pa. 1974), *aff'd*, 522 F.2d 302 (3d Cir. 1975), *cert. denied*, 426 U.S. 947 (1976).

²³⁵ *See Separation of Powers*, *supra* note 106, at 886.

²³⁶ *See Center for Auto Safety*, 747 F.2d at 3 n.2.

²³⁷ *Id.* at 6. Scalia admitted that the cited legislative history only indicated what the Administrator may do, not what he was required to do. *Id.* at 5.

²³⁸ *Id.* at 6.

On the question of standing, Scalia relied on *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.²³⁹ In *Center for Auto Safety*, he found the petitioners' assertion that they are "concerned about, and breathe, pollutants in the ambient air" came within the broad grant of standing announced by the Supreme Court in *SCRAP*.²⁴⁰ Scalia's statement in *Center for Auto Safety* on standing thus contrasts sharply with his earlier theoretical work and his opinions.

Scalia had specifically cited *SCRAP* in his *Separation of Powers* article as an example of where standing had been extended too far.²⁴¹ In fact, Scalia explained in his 1983 article on standing how he believes standing should restrict courts to their proper role:

If I am correct that the doctrine of standing, as applied to challenges to governmental action, is an essential means of restricting the courts to their assigned role of protecting minority rather than majority interests, several consequences follow. First . . . it would follow that not *all* "concrete injury" indirectly following from governmental action or inaction would be capable of supporting a congressional conferral of standing. One can conceive of such a concrete injury so widely shared that a congressional specification that the statute at issue was meant to preclude precisely that injury would nevertheless not suffice to mark out a subgroup of the body politic requiring judicial protection. For example, allegedly wrongful governmental action that affects "all who breathe." [sic] There is surely no reason to believe that an alleged governmental default of such general impact would not receive fair consideration in the normal political process.²⁴²

Scalia's opinion in *Center for Auto Safety* departed from the above quoted language.²⁴³ Not only did Scalia's opinion grant standing for a group to challenge such a broad action, but he did so by quoting language from a case that he specifically criticized in his earlier article.²⁴⁴

Scalia did not, however, completely abandon his earlier conservative stance in *Center for Auto Safety*. He did feel compelled to bring up the issue in *Center for Auto Safety*, which may indicate a certain concern, if not uneasiness, as to whether standing existed.²⁴⁵

²³⁹ *Id.* at 3 n.2.

²⁴⁰ *Id.*

²⁴¹ *Separation of Powers*, *supra* note 106, at 890.

²⁴² *Id.* at 895-96.

²⁴³ See *Center for Auto Safety*, 747 F.2d at 3 n.2.

²⁴⁴ See *id.*; see also *Separation of Powers*, *supra* note 106, at 895-96.

²⁴⁵ See *Center for Auto Safety*, 747 F.2d at 3 n.2.

Moreover, his use of the phrase, "at least," to explain how plaintiffs' fell within the purview of *SCRAP* may have indicated his doubts as to the standing of the nonprofit organizations.²⁴⁶ Yet, the fact remains that he did find standing, not only for the individuals but for the organizations as well.²⁴⁷

Scalia's position in *Center for Auto Safety* represents a radical departure from his earlier stated theoretical views in at least two ways. First, the ease with which he eliminated the standing issue in *Center for Auto Safety* indicates a judicial readiness to find a congressional grant of standing that Scalia previously criticized.²⁴⁸ Standing to review this type of EPA action is subject to the judicial review provisions of the APA.²⁴⁹ Because there is no language in the Clean Air Act that specifically provides review to persons aggrieved or adversely affected as the *Center for Auto Safety* plaintiffs were, then Scalia apparently found standing on the basis of the "transmogrified" affirmative grant of standing to parties in fact aggrieved "regardless of a lack of legal right or specific statutory language."²⁵⁰ Thus in *Center for Auto Safety*, Scalia followed an interpretation that he had criticized earlier as a major cause of the current liberalized standing doctrine.²⁵¹

The shift in Scalia's position is also clear from his finding in *Center for Auto Safety* that the breathing of polluted air is a sufficient injury in fact to confer standing on the plaintiffs.²⁵² Scalia stated in his earlier article that such an injury was one that the courts should not recognize because it would receive fair consideration in the majoritarian, democratic processes.²⁵³ To be consistent with his own article, he thus would have viewed *Center for Auto Safety* as a case where the court should avoid protecting majority rights and refrain from finding a congressional designation of a "minority" group that encompasses the entire population.²⁵⁴ Scalia's decision in *Center for Auto Safety*, thus, represents a much different stance from his earlier writings.

²⁴⁶ See *id.*

²⁴⁷ See *id.*

²⁴⁸ See *id.*; see also *Separation of Powers*, *supra* note 106, at 886.

²⁴⁹ 5 U.S.C. § 702 (1982).

²⁵⁰ See *Separation of Powers*, *supra* note 106, at 889 (quoting *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 872 (D.C. Cir. 1970)).

²⁵¹ See *Separation of Powers*, *supra* note 106, at 889.

²⁵² See *Center for Auto Safety*, 747 F.2d at 3 n.2.

²⁵³ *Separation of Powers*, *supra* note 106, at 896.

²⁵⁴ See *id.*

Despite the departure from his stated standing theory, the *Center for Auto Safety* decision does not represent a shift away from the basic tenets of Scalia's philosophy of judicial self-restraint. In *Center for Auto Safety*, Scalia was still able to restrict the power of the courts by deferring to what he found to be the congressional intent.²⁵⁵ The decision also assured that the courts would no longer need to make policy decisions concerning proper emission reduction plans by finding that Congress had already decided the proper policy to follow.²⁵⁶ The *Center for Auto Safety* decision can thus be seen as reducing the power of the courts by following the interpretation of a coordinate branch of government.

Nor is *Center for Auto Safety* an isolated result. Scalia reached a similar, if less dramatic, result in *Thomas v. New York*.²⁵⁷ The *Thomas* decision is interesting more for what Scalia did not do than for what he did.²⁵⁸ By not addressing certain statutory and constitutional questions, Scalia accepted a much lower injury in fact standard than his theoretical writings indicated he would be willing to do. Further, the injury in *Thomas* effects the type of majoritarian interests that Scalia had earlier indicated were not to be resolved by the courts.²⁵⁹

Thomas arose from a letter sent by Douglas Costle, then Administrator of the Environmental Protection Agency, to the Secretary of State, Edmund Muskie.²⁶⁰ In the letter, Costle indicated that acid deposition was endangering the United States and Canada and that sources in both countries contributed to the problem.²⁶¹ The issue on appeal in *Thomas* was whether, under section 115 of the Clean Air Act,²⁶² Administrator Costle's letter legally obligated his successors to identify the states responsible for the acid rain and order those states to abate the responsible emissions.²⁶³

²⁵⁵ See *Center for Auto Safety*, 747 F.2d at 6.

²⁵⁶ See *id.*

²⁵⁷ 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987) (Scalia, J., took no part in the consideration of the petitions for certiorari).

²⁵⁸ *Id.*

²⁵⁹ See *Separation of Powers*, *supra* note 106, at 894-95.

²⁶⁰ *Thomas v. New York*, 802 F.2d 443, 1444-45 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

²⁶¹ *Id.* at 1445.

²⁶² 42 U.S.C. § 7415(a) (1982).

²⁶³ This section provides, in pertinent part:

Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign

Plaintiffs were several eastern states, national environmental groups, American citizens who owned property in eastern Canada, and a Congressman.²⁶⁴ In his decision for the majority, Scalia dismissed any question of standing by noting that the plaintiffs were suing pursuant to the "citizen suit" provision, section 304, of the Clean Air Act.²⁶⁵ Section 304 permits any person to bring a civil action "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."²⁶⁶

Scalia's position in *Thomas* appears to be nothing more than a proper deferral to Congress' ability to confer standing.²⁶⁷ However, the issue is not so easily dismissed. Scalia was quite careful to note in his article that congressional power is not unlimited; Congress cannot extend standing beyond the core article III requirement of injury in fact.²⁶⁸ Section 304 is antithetical to Scalia's stated views regarding a strict standard of injury in fact. In this light, the relevant question is why, in *Thomas*, Scalia did not address the constitutional infirmities of the "citizen suit" provision, or, in lieu of that, limit the court's grant of standing to only those who had suffered constitutionally sufficient injury, as he defined such injury in his writings.²⁶⁹ Scalia had the ability to raise such issues *sui juris* because standing issues are jurisdictional and must be raised by the court.²⁷⁰

There are several explanations why Scalia did not declare the citizen suit provision's grant of universal standing unconstitutional. Although there is support for the view that an unlimited grant of standing is unconstitutional,²⁷¹ such a decision runs counter to the

country . . . the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

42 U.S.C. § 7415(a) (1982).

²⁶⁴ *Thomas*, 802 F.2d at 1445.

²⁶⁵ *Id.* (citing 42 U.S.C. § 7604(a)(2) (1982)).

²⁶⁶ 42 U.S.C. § 7604(a)(2).

²⁶⁷ *Thomas*, 802 F.2d at 1445-46.

²⁶⁸ *Separation of Powers*, *supra* note 106, at 896.

²⁶⁹ *Id.*

²⁷⁰ See *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 954 n.4 (1984). Even though neither of the parties questioned the state court's conclusion that the plaintiff had sustained a sufficient injury to establish standing, the Supreme Court stated that "[n]evertheless, because the 'case or controversy' requirement is jurisdictional here, we must satisfy ourselves that the requirements of Article III are met." See also *Regents of University of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978), where the Court stated: "[p]etitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected."

²⁷¹ A number of cases have held that reading the Clean Air Act's "citizen suit" provision as granting unlimited standing would be unconstitutional. See *Mountain States Legal Found. v.*

recognized judicial duty to avoid decisions of constitutional questions.²⁷² Courts recognize that they should thus avoid possible constitutional issues by giving a questionable statute a construction that avoids such problems.²⁷³ This approach is also in keeping with Scalia's own policy of judicial self-restraint.²⁷⁴

Costle, 630 F.2d 754, 767 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981); Natural Resources Defense Council v. Env'tl. Protection Agency, 507 F.2d 905, 908-09 (9th Cir. 1974); Natural Resources Defense Council v. Env'tl. Protection Agency, 481 F.2d 116, 119-21 (10th Cir. 1973).

In the earliest of these cases, Natural Resources Defense Council v. Environmental Protection Agency, 481 F.2d at 118-19, Judge Breitenstein reviewed the standing doctrine in ruling on the validity of the citizen suit provision. In finding that the section cannot be read to grant universal standing, Judge Breitenstein used language quite evocative of Scalia's own analysis of standing.

We further believe that under the doctrine of separation of powers the question of the validity and extent [of] congressional authorization is for determination by the judicial branch. Otherwise the provisions of Art. III limiting judicial power to cases and controversies is thrown into the discard. . . . Unrestricted litigation by private persons to assert their own ideologies under a claim of public interest presents the potential of hazardous consequences to our constitutional system based as it is on the concept of separation of powers.

Id. at 120-21.

Reliance on these cases would have given Scalia a strong opportunity to limit the broad grants of standing in environmental litigation that he had consistently criticized. *See Separation of Powers*, *supra* note 106, at 897; *Rulemaking as Politics*, *supra* note 210, at vi.

Moreover, Scalia discussed such limitations on congressional conferrals of standing in *Covelo* where he stated: "It is enough to note that if Congress can create an 'injury in fact' by merely saying that a particular class has a 'right' to have something done, the case or controversy clause will have been transformed from a constitutional imperative to a statutory option." *Covelo*, slip op., dissenting opinion.

Further support for a limited grant of standing is found in *McClure v. Carter*, 513 F. Supp. 265, 268-71 (D.C. Idaho 1981), *aff'd sub nom.* *McClure v. Reagan*, 454 U.S. 1025 (1981), which held that despite a statute purporting to allow any member of Congress to challenge a judge's appointment, a senator did not have standing to make such a judicial challenge in either his individual or official capacity. *Id.* at 271.

An additional argument for eliminating a universal grant of standing would also come from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803), which stated that "a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Marbury* also established that it is the province of the courts to decide the issue of constitutionality. *Id.* at 176. Given Scalia's past reliance on *Marbury* on the issue of standing, such an approach seems natural to expect in Scalia's discussion of the congressional grant of standing here. *See Separation of Powers*, *supra* note 106, at 883.

For further discussion of citizen suit provisions, see also Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1276-79 (1977) (discussing the constitutional implications of universal standing provision of the Clean Air Act).

Professor Berger provides a contrary analysis of the article III issue. *See Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969). Professor Berger uses an historical analysis to refute the notion that standing is grounded in requirements of injury in fact and separation of powers. *Id.*

²⁷² *See Rescue Army v. Municipal Court*, 331 U.S. 549, 568-74 (1947).

²⁷³ *See id.* at 569.

²⁷⁴ *See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW* 87 (1986).

Consequently, to avoid the constitutional question in *Thomas*, Scalia must have given section 304 a construction that required an injury sufficient to meet article III.²⁷⁵ Such a construction is consistent with that given by the District Court.²⁷⁶ The District Court found that litigants suing under section 304 may only vindicate their claim if they met the constitutional requirements of article III.²⁷⁷

Because the Court of Appeals disposed of the standing question in such a cursory manner, it is arguable that Scalia not only accepted the lower court's reading of the statute, but also implicitly accepted their finding of injury in fact. If this is correct, Scalia accepted a finding of standing based on acid deposition, an injury not only majoritarian but also an injury whose redressability is questionable.²⁷⁸ Even if he did not tacitly accept this theory, Scalia still accepted a much lower standard of injury in fact than one might have thought based on his earlier stated theoretical views.²⁷⁹ The only other possible injury to the plaintiffs was the agency's failure to impose a requirement on the states.²⁸⁰ This is important because Scalia had also specifically criticized this type of third party injury in his standing article.²⁸¹ Thus, either possible basis for standing in *Thomas* departs significantly from the strict, nonmajoritarian stance Scalia had previously espoused.

The results of both *Center for Auto Safety v. Ruckelshaus* and *Thomas v. New York* could lead to the conclusion that Scalia may not necessarily impose his strict view of standing onto environmental litigation.²⁸² This conclusion can also be bolstered by Scalia's dissenting opinion in *Center for Auto Safety v. National Highway Traffic Safety Administration*²⁸³ (NHTSA). In NHTSA, the same organization as in *Ruckelshaus* and additional plaintiffs filed a peti-

²⁷⁵ See *Thomas*, 802 F.2d at 1445-46.

²⁷⁶ See *New York v. Thomas*, 613 F. Supp. 1472, 1479-80 (D.D.C. 1985).

²⁷⁷ See *id.*; see also *Friends of the Earth v. Carey*, 552 F.2d 25, 33 (2d Cir. 1977), *cert. denied*, 434 U.S. 902 (1977); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 896-97 (N.D. Cal. 1984); *Friends of the Earth v. Potomac Elec. Power Co.*, 419 F. Supp. 528, 530 (D.D.C. 1976). But see *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 814 n.26 (D.C. Cir. 1975) (citizens organization had standing to sue under section 304 without alleging an injury in fact).

²⁷⁸ See *New York v. Thomas*, 613 F. Supp. at 1479-81.

²⁷⁹ See *Thomas*, 802 F.2d at 1445-46; see also *Separation of Powers*, *supra* note 106, at 881-82.

²⁸⁰ See *Thomas*, 802 F.2d at 1446.

²⁸¹ See *Separation of Powers*, *supra* note 106, at 894.

²⁸² See *supra* text accompanying notes 107-72.

²⁸³ See 793 F.2d 1322 (D.C. Cir. 1986) (Scalia, J., dissenting); see also *In re Center for Auto Safety*, 793 F.2d 1346 (D.C. Cir. 1986) (Scalia, J., dissenting) (companion case).

tion challenging the validity of a National Highway Traffic Safety Administration rule amending its previously published fuel economy standards for light trucks for the 1985 model year, and establishing light truck standards for the 1986 model year.²⁸⁴ Petitioners were organizations that worked to promote energy conservation.²⁸⁵ They sought standing as representatives of their members.²⁸⁶ They alleged that their members were injured because of their interest in purchasing the most fuel-efficient vehicles possible.²⁸⁷

The government countered that the petitioners lacked standing because their claims of injury were nothing more than generalized grievances shared by many people and were thus insufficient to establish standing.²⁸⁸ In characterizing the government's argument as "completely misplaced,"²⁸⁹ the majority stated that "[t]he question of *how many suffer* from an injury is logically unrelated to the question of *whether there is* an injury and has nothing to do at all with the fitness of a particular party to bring a claim."²⁹⁰

In addition, the majority in *NHTSA* found that the applicable statute²⁹¹ granted review to those adversely affected, and thus removed the court's ability to erect prudential barriers.²⁹² In such cases, the court stated, "it matters not one iota if a large number of people share the injury and would benefit from its redress. The courts may appropriately function as the guardians of majority interests, without weakening the separation of powers, when Congress has decided to grant them that role."²⁹³

²⁸⁴ *Center for Auto Safety v. NHTSA*, 793 F.2d at 1323. The other groups were Environmental Policy Institute, Public Citizen, and Union of Concerned Scientists. *Id.* at 1323 n.3.

²⁸⁵ *Id.* at 1323.

²⁸⁶ *Id.* at 1324.

²⁸⁷ *Id.* at 1332. Petitioners base this injury on the following claimed results of the NHTSA's action:

NHTSA's low CAFE standards will diminish the types of fuel-efficient vehicles and options available. Without the threat of civil penalties, manufacturers will not be prodded to install as many fuel-saving devices, nor to install them as promptly. As a result, petitioners' members will have less opportunity to purchase fuel-efficient light trucks than would otherwise be available to them. In addition, the petitioners urge that NHTSA's action sends an instant message that standards will be altered to accommodate manufacturers' marketing plans. Such a message can only retard the current development of new technologies that would make even greater fuel savings possible in the future.

Id.

²⁸⁸ *Id.* at 1333.

²⁸⁹ *Id.* at 1333-34.

²⁹⁰ *Id.* at 1334.

²⁹¹ 15 U.S.C. § 2002(b) (1982).

²⁹² *Center for Auto Safety v. NHTSA*, 793 F.2d at 1337.

²⁹³ *Id.*

In his dissent to *NHTSA*, Scalia characterized the majority opinion as violating separation of powers because it was "not judicial vindication of private rights, but judicial infringement upon the people's prerogative to have their elected representatives determine how laws that do not bear upon private rights shall be applied."²⁹⁴ Therefore, Scalia concluded that the plaintiffs' alleged injury was "of interest only to the society at large, and should be resolved through the political mechanisms by which that society acts. There is no basis for believing that these plaintiffs have suffered the personal hurt that alone justifies judicial interference with the execution of the laws."²⁹⁵ In contrast to his environmental opinions, in *NHTSA* Scalia resurrected his earlier strict interpretation of standing as an essential element of separation of powers, and as a method of restricting the courts' power over the other branches of government.²⁹⁶ Apparently, Scalia was only willing to adopt the liberal view of standing where it had been specifically required by Supreme Court precedents. He applied his stricter view of standing, however, to all other areas. Scalia thus seemed to be trying to limit the spread of the liberal standing doctrine as much as possible.

V. JUSTICE SCALIA'S IMPACT ON FUTURE ENVIRONMENTAL LITIGATION

Scalia's divergent positions as to standing in environmental cases versus non-environmental cases cannot be attributed to merely a pro-environmental viewpoint. Such a conclusion is unjustified because Scalia's record on the Court of Appeals is uneven; he has joined with majority panels in decisions that can be viewed as anti-environmental.²⁹⁷ The most prominent of these was *Thomas v. New*

²⁹⁴ *Id.* at 1342.

²⁹⁵ *Id.* at 1345.

²⁹⁶ See *Separation of Powers*, *supra* note 106, at 894-97.

²⁹⁷ See *California v. Watt*, 19 Env't Rep. Cas. (BNA) 1281 (D.C. Cir. 1983) (Interior Department oil and gas leasing plan does not have to institute a schedule for determining if the proposal is consistent with state coastal management plan); *Montgomery Envtl. Coalition, Inc. v. Envtl. Protection Agency*, 19 Env't Rep. Cas. (BNA) 1169 (D.C. Cir. 1983) (not designated for publication) (court lacks jurisdiction to review EPA order allowing a sewage treatment plant to discharge higher levels of pollutants than allowed by plant's discharge permit). But see *Natural Resources Defense Council v. Envtl. Protection Agency*, 20 Env't Rep. Cas. (BNA) 1264 (D.C. Cir. 1984) (the EPA can consider emissions from dockside stationary activities when setting standards under the Clean Air Act for marine terminals); *Sierra Club v. Peterson*, 19 Env't Rep. Cas. (BNA) 1705 (D.C. Cir. 1983) (Interior Department violated NEPA by failing to perform an adequate review of the environmental consequences caused by issuing oil and gas leases for two National Forests).

York,²⁹⁸ where he held that the EPA's failure to take action concerning acid deposition was unreviewable because Administrator Costle's letter to Secretary of State Muskie did not constitute a valid rulemaking because there were no notice-and-comment procedures.²⁹⁹

These divergent results indicate that, to properly determine whether Scalia will adhere to the lesser showing of injury required for standing in environmental litigation, it is necessary first to determine if other factors influenced Scalia's more liberal positions on standing in *Center for Auto Safety v. Ruckelshaus* and *Thomas v. New York*.³⁰⁰ Moreover, it must also be determined how these factors may have influenced the divergent results on the merits, that is, a pro-environmental result in *Center for Auto Safety*³⁰¹ and an anti-environmental result in *Thomas*.³⁰² The key to understanding these apparent inconsistencies seems to lie in the overall jurisprudential philosophy that Scalia brings to his decisionmaking.

A. Factors Influencing Justice Scalia's Decisionmaking

A realistic assessment of the judicial process must recognize that an important component of any judge's decisionmaking is the overall jurisprudential philosophy to which that judge adheres. This is especially true where the case being decided involves no statutory or common-law commands that call for a specific result.³⁰³ A judge thus cannot decide the case merely by reference to the will of the legislature or an agency.³⁰⁴ In such wide open cases, judges are able to inject into their decisionmaking value preferences that derive from their own jurisprudential philosophy.

One fertile area for these wide open cases is constitutional law. In interpreting the broad phrases of the Constitution, Justices are almost compelled to apply their own value preferences.³⁰⁵ Additionally,

²⁹⁸ 802 F.2d 1443 (D.C. Cir. 1986).

²⁹⁹ *Id.* at 1446-47.

³⁰⁰ See *supra* text accompanying notes 218-81.

³⁰¹ See 747 F.2d 1 (D.C. Cir. 1984).

³⁰² See 802 F.2d 1443 (D.C. Cir. 1986).

³⁰³ See R. POSNER, *THE FEDERAL COURTS* 198-207 (1985).

³⁰⁴ *Id.* at 206-07.

³⁰⁵ Felix Frankfurter once wrote that many constitutional concepts were "vague or purposely ambiguous" and "that questions of more-or-less, of matters of degree and appraisals of policy necessarily come into play and control the controversy." He then stated that:

Thus, in construing the Constitution in these vital controversies, the Supreme Court does not go to a dark room and by a process of nature develop the constitutional photographic negative into the picture of its decision. The Court is engaged in a

with the rise of decisions that are less and less anchored to the actual text of the Constitution, this type of value-laden decisionmaking has become even more prevalent.³⁰⁶

Both standing and environmental law are such wide open areas. Standing, as has been described in this note, has long been an area where value-laden decisionmaking has thrived.³⁰⁷ This value-laden decisionmaking has led to a wide range of decisions with very few areas that are bound by specific and consistent precedents.³⁰⁸ As for environmental law, it can be argued that the pervasive environmental legislation of the last twenty years predominantly controls environmental law. It is important to recognize, however, that Scalia believes otherwise. That is, he believes that the recent promotion of environmental interests is a direct result of the judiciary's value preferences for those interests.³⁰⁹ Consequently, standing and environmental law are sufficiently wide open so that Scalia should be able to address his value preferences when deciding such issues that come before the Supreme Court.

Even if standing and environmental law are not viewed as wide open, a reasonable analysis of the judicial process recognizes that any decision has elements of a judge's personal values.³¹⁰ As Judge—later Justice—Benjamin Cardozo stated, a judge “must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he

creative act—it must exercise judgment. And into the totality of its judgment enters the whole of the experience, the imagination, the forecast of the future, the fears and hopes, of the members of the Court.

FELIX FRANKFURTER ON THE SUPREME COURT 336–37 (P. Kurland ed. 1970).

³⁰⁶ See R. POSNER, *THE FEDERAL COURTS* 202 (1985). Just because values enter the decisionmaking does not mean that anything goes. Professor Tribe noted these limitations when he observed that his long study of constitutional law had convinced him that “constitutional interpretation is a practice alive with choice but laden with content; and that this practice has both boundaries and moral significance not wholly reducible to, although never independent of, the ends for which it is deployed.” L. TRIBE, *CONSTITUTIONAL CHOICES* 4 (1985).

³⁰⁷ See *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59 (1978).

³⁰⁸ Environmental law is one of those few areas that seem to follow a specific and identifiable trend. In environmental litigation, that trend is toward a more liberal approach to standing issues, with only a requirement of very minimal injuries. See *supra*, text accompanying notes 69–103.

³⁰⁹ See *Separation of Powers*, *supra* note 106, at 896–97.

³¹⁰ See K. LLEWELLYN, *THE COMMON LAW TRADITION* 217–22 (1960). Llewellyn was one of the leaders of the Legal Realism movement. He described Legal Realism as a method of inquiry rather than a philosophy. The only tenet of the method is to look at the legal process from a fresh perspective to see how it really works. *Id.* at 510.

can, which weight shall tip the scales."³¹¹ Therefore, even in cases where there is very little room for judicial maneuvering, judges will, in some part, inject their own values into their decisionmaking. If nothing else, judges, being only human, will necessarily interpret facts based on their own world views. The relevant inquiry in analyzing Scalia thus becomes one of determining the jurisprudential philosophy that he will bring to his decisionmaking on the Supreme Court.

Scalia's overarching philosophy is judicial self-restraint.³¹² The prime goal of this philosophy is a reduction in the perceived over-judicialization of government.³¹³ A self-restrained judge will thus seek to limit judicial power over other governmental institutions by paying greater deference to congressional and administrative decisions.³¹⁴ This deference can be achieved either by deferring on the actual merits of the case³¹⁵ or by invoking stricter standards for judicial review, as Scalia suggests in his 1983 article on standing.³¹⁶ By starting from the premise that Scalia will approach cases from the perspective of judicial self-restraint, it will be possible to return to an analysis of Scalia's Court of Appeals decisions to explain their results and to determine what effect Scalia may have on environmental litigation.

B. Judicial Restraint Analysis of Justice Scalia's Decisionmaking

One reason for supposing that an inquiry into Scalia's value preferences will help explain his opinions and will yield reliable predictions of his future position on environmental issues lies in a recognition that Scalia has already used the standing doctrine as a method to dispose of the merits of particular cases. In other words, Scalia has allowed his view of the merits to dictate his conclusions as to whether the standing requirements have been met.³¹⁷

This type of value-laden decisionmaking provides a reasonable explanation, in part, for the lack of concern that Scalia expressed

³¹¹ B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 162 (1921).

³¹² See Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 382; *Chief Justice Burger to Retire From Supreme Court; Reagan Nominates Rehnquist as Successor, Scalia to Fill Vacancy*, 17 Env't Rep. (BNA) at 217 (June 6, 1986).

³¹³ R. POSNER, *THE FEDERAL COURTS* 208 (1985).

³¹⁴ *Id.*

³¹⁵ See *Center for Auto Safety v. Ruckelshaus*, 747 F.2d 1 (D.C. Cir. 1984).

³¹⁶ See *Separation of Powers*, *supra* note 106.

³¹⁷ See L. TRIBE, *CONSTITUTIONAL CHOICES* 100 (1985).

for the standing problems in *Center for Auto Safety v. Ruckelshaus*.³¹⁸ By strictly enforcing what he asserted was the legislative mandate, Scalia was able to promote his own preference for judicial self-restraint by deferring to congressional intent³¹⁹ and by encouraging more specific legislative delegations to agencies.³²⁰ In addition, by mandating that the only proper remedy was recall and repair,³²¹ Scalia was ensuring that the EPA would only approve such plans and thus ensuring that the courts would no longer be asked to decide this policy issue. *Center for Auto Safety* consequently restricted the courts' power. Such values bind the particular agency, as well as the court, and place policy making power in the most majoritarian governmental body. For these reasons, it is possible that in *Center for Auto Safety* Scalia was willing to subvert his otherwise strict view of the standing requirements. Arriving at a "pro-environmental" decision can thus be seen as incidental to Scalia; in *Center for Auto Safety* it was merely a byproduct of achieving the goals of his judicial agenda.

Avoiding application of strict standing requirements in *Center for Auto Safety* also made sense from a practical standpoint. Scalia was faced with a specific precedent—*SCRAP*—which granted standing for an injury to the air the plaintiffs breathed.³²² Consequently, it would have been quite difficult for Scalia to distinguish the injury in *Center for Auto Safety* from the injury in *SCRAP*. Moreover, even if he were successful in such a task, he faced a great likelihood of being overturned if the Supreme Court granted certiorari. The decision in *Center for Auto Safety* can thus be explained on both practical and theoretical levels.

The same value preferences and judicial practicalities also help explain the result of *Thomas v. New York*.³²³ *Thomas* can be viewed as a value-laden decision because Scalia lessened his requirements of standing to address directly the underlying issue of the role the court should play in what he viewed as an act of political discretion, that is, the agency's failure to take action on acid deposition.³²⁴

³¹⁸ See 747 F.2d 1 (D.C. Cir. 1984). See *supra* text accompanying notes 221–56.

³¹⁹ See *Center for Auto Safety*, 747 F.2d at 5.

³²⁰ See *id.* at 5–6; 1976 *Bicentennial Institute—Oversight and Review of Agency Decision-making*, 28 ADMIN. L. REV. 569, 694–95, 701 (1976).

³²¹ *Center for Auto Safety*, 747 F.2d at 6.

³²² *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973).

³²³ 802 F.2d 1443 (D.C. Cir. 1986).

³²⁴ See *id.* at 1448; *Rulemaking as Politics*, *supra* note 210, at v.

Because dispensing of *Thomas* on standing requirements would have been adverse to the congressional intent of the "citizen suit" provision of the Clean Air Act,³²⁵ such a decision would have faced a strong likelihood of reversal. By finding in *Thomas* that Administrator Costle's letter was an unreviewable act, Scalia was still able to restrict the courts' power in relation to the other branches of government and thus promote his judicial agenda.

The results in the non-environmental cases, *Covelo*³²⁶ and *Center for Auto Safety v. NHTSA*,³²⁷ can also be explained by reference to both Scalia's theoretical views and the practicalities of judicial decisionmaking. In these cases, Scalia could more easily assert his preferences for reducing the judiciary's power by restricting access to it. He was not faced with specifically applicable precedents liberally granting standing as he was in the environmental area. Scalia could thus pick and choose among the widely divergent standing cases to find support for his strict standing interpretation.³²⁸ Consequently, it was the confused nature of the standing doctrine that allowed Scalia to strictly construe standing in *Covelo* and *Center for Auto Safety v. NHTSA*.

The results of these cases indicate a number of possibilities for standing in future environmental litigation and for environmental litigation in general. Although Scalia was willing to defer to the liberal grants of standing accorded to environmental litigation, it seems possible that such deference could change on the Supreme Court. Appellate courts have a dual function of correcting error and of setting forth principles of law to guide the lower courts.³²⁹ Although some have argued that intermediate appellate courts do, and should, have a major lawmaking function,³³⁰ Scalia has said that intermediate appellate courts should take a more restricted approach to making new law.³³¹ Such constraints may not occur on the Su-

³²⁵ 42 U.S.C. § 7604(a)(2) (1982).

³²⁶ No. 82-2377, 82-2417, slip op. (D.C. Cir. Dec. 21, 1982) (LEXIS, Genfed library, USAPP file) (per curiam, Scalia, J., dissenting). See *supra* text accompanying notes 175-217.

³²⁷ 793 F.2d 1322 (D.C. Cir. 1986). See *supra* text accompanying notes 283-96.

³²⁸ Among the cases Scalia cites in *Covelo* are *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), and *Warth v. Seldin*, 422 U.S. 490 (1975). In *Center for Auto Safety v. NHTSA*, Scalia relied on such strict standing cases as *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

³²⁹ Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A.L. REV. 299, 302 (1984).

³³⁰ See Grey, *Intermediate Judicial Creativity*, TRIAL, April, 1985, at 26; Kaplan, *Do Intermediate Appellate Courts Have a Lawmaking Function?*, 70 MASS. L. REV. 10 (1985).

³³¹ See *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, *supra* note

preme Court since the pull of precedent will be much weaker there than on the Court of Appeals. This view is further bolstered by the fact that most adherents of judicial self-restraint consider deference to precedent as a completely separate phenomenon, unrelated to the goals of self-restraint.³³² Their exclusivity seems correct because the proponents of judicial self-restraint see their goal as reducing the judiciary's power in relation to the other branches of government and not in relation to activist courts of the past.³³³

Consequently, Scalia may push for his stricter standing requirements in environmental litigation. It is difficult to determine whether he will be able to garner enough support to carry out his views.³³⁴ What seems more certain is that Scalia will likely advocate a decrease in what he views as the Supreme Court's promotion of environmental interests based on the Justices' own socioeconomic prejudices.³³⁵ Therefore, if Scalia is unable to get the votes necessary to restrict judicial review by tightening up the standing requirements, he may still try to defer to decisions made by Congress or the agencies as he did in *Center for Auto Safety v. Ruckelshaus*.³³⁶

This approach does not necessarily doom all environmental interests. Strict adherence to a self-restrained judicial approach will also produce some pro-environmental decisions if such policies are clearly enunciated by Congress and the current administration.³³⁷ It may thus ultimately be the future political importance of environmental issues that dictates Justice Scalia's positions in environmental cases.

VI. CONCLUSION

The divergent results of Scalia's Court of Appeals decisions on standing make it somewhat unlikely that on the Supreme Court

312, at 359-75 (criticizing the lower court's role in the creation of hybrid rulemaking procedures).

³³² See R. POSNER, *THE FEDERAL COURTS* 210 (1985).

³³³ *Id.* at 208.

³³⁴ In *Allen v. Wright*, 468 U.S. 737, 740 (1984), Justice O'Connor wrote an opinion joined by Burger, C.J., and White, Powell, and Rehnquist, JJ., denying standing to a group that sought to have IRS standards for denying tax exempt status to racially discriminatory private schools changed. In arriving at that holding, the Supreme Court stated that standing requirements must be interpreted by reference to separation of powers principles. *Id.* at 752. Professor Nichol sees the Court's emphasis on separation of powers principles as possibly portending a major restriction on judicial access in order to achieve deference to the other branches of government. Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 636 (1985). This analysis suggests that Scalia may have some support for his standing theories.

³³⁵ See *Separation of Powers*, *supra* note 106, at 896-97.

³³⁶ See 747 F.2d 1 (D.C. Cir. 1984). See *supra* text accompanying notes 221-54.

³³⁷ See R. POSNER, *THE FEDERAL COURTS* 208-09 (1985).

Scalia will advocate a hard and fast rule of standing inimical to environmental interests. That same divergence, however, indicates that Scalia is willing to let his view of the merits dictate the result of the standing question. Thus, based on his past decisions, when not bound by specific congressional or administrative directives, Scalia will most likely seek to promote the philosophy of judicial self-restraint by cutting back the Court's potentially powerful role in promoting the environmental agenda.

